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October Term, 1970

Supreme Court, U.S.
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No. 1261

IN THE MATTER OF
CLEVELAND J. STOCKTON and
DOROTHY ALTIMAN STOCKTON,
Plaintiffs-Appellees,
(Respondents)

versus

JOHN A. ALTIMAN,
Defendant-Appellant,
(Petitioner)

and

ELEANOR ALTIMAN CURRAN,
Defendant-Appellee,
(Respondent)

PETITION FOR A WRIT OF CERTIORARI

To The United States Court of Appeals
For The Fifth Circuit

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IN THE
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October Term, 1970

No.

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PETITION FOR A WRIT OF CERTIORARI

To The United States Court of Appeals
For the Fifth Circuit

TO THE HONORABLES, THE CHIEF JUSTICE AND
THE ASSOCIATE JUSTICES OF THE
SUPREME COURT OF THE UNITED STATES:

Petitioner prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit dated September 22, 1970,

on which petition for rehearing and petition for rehearing en banc was denied on October 28, 1970.

OPINIONS BELOW

The Judgment of the United States District Court for the Southern District of Texas is Appendix A. The Opinion and Judgment of the United States Court of Appeals for the Fifth Circuit is Appendix B (reported at 432 F.2d 946). The denial of Appellants petition for rehearing and for rehearing en banc is Appendix C (reported at 432 F.2d 952).

JURISDICTION

The opinion and judgment of the United States Court of Appeals was entered on September 22, 1970; the petition for rehearing en banc was denied on October 28, 1970. Jurisdiction of this Court is invoked under 28 USC § 1254(1) and 28 USC § 2101(c).

CONSIDERATIONS WARRANTING REVIEW ON CERTIORARI

Sound judicial discretion warrants that the United States Supreme Court review the acts and actions of the lower courts with regard to the manner in which they rendered a decision based on jury findings in a civil case, all of which constitutes an improper taking of petitioner's property in contravention of Amendments V, VII and XVI of the U. S. Constitution.

The consternation of the petitioner-appellant arises

from the fact that: i) he entered into a partnership in 1950, ii) he worked hard and diligently to build up his partnership interest for over eleven years, while raising and supporting a family, iii) during these years he left most of his earnings in the partnership to enable it to grow ($210,433); iv) the partnership was dissolved on April 30, 1961 by the unilateral action of one partner, his step-father, v) he sued for an accounting, feeling constrained to do so because the six year statute of limitations, in New York, was about to run, vi) he suffered the agonies of litigating against his mother for two years in the Texas courts, vii) he painfully sat through a two week jury trial in 1969, in an effort to obtain his capital funds and an equitable accounting, viii) after the trial, the Court submitted seven interrogatories, all prepared within the prior hour, to the jury, which was required (by yes and no answers) to communicate its findings, ix) the jury findings, properly construed, gave Altman at least his capital account plus 50% of the partnership equity up to date of dissolution; nevertheless, x) the lower courts held that Altman should receive neither his capital account nor an accounting for his 50% partnership equity.

Now, twenty years after the partnership was formed, this Honorable Court of last resort must decide whether to exercise its discretion and review the Fifth Circuit decision. If ever there were equitable considerations upon which the United States Supreme Court should review the conduct of the lower courts, this is one. Will this Honorable Court bring up this matter for review and set some standards for the lower courts, with regard to the manner in which jury findings must be

considered and utilized? Will this Honorable Court correct an inequity?

The Trial Court has departed from the accepted and usual course in judicial proceedings with regard to jury findings, and the Fifth Circuit has sanctioned this departure by the Trial Court, so as to justify the call for this Honorable Court's power of supervision.

The present judgment cannot stand when the jury findings are logically analyzed in conjunction with the record and testimony in this case. The lower courts overlooked salient testimony and evidence in their attempt to rationalize the jury's findings. We hope this Honorable Court will take time from its busy schedule to oversee and review the way the lower courts mishandled jury findings of fact in a civil case. Maybe, at this time when court dockets are so overcrowded, beneficial guidelines and standards can be established, while at the same time permitting a single citizen to obtain justice in an equitable situation which cries out for redress.

QUESTIONS PRESENTED

Circumstances Creating Questions

The suit is for an accounting by a partner, John Altman, against his partners, Mr. and Mrs. C. J. Stockton. Mrs. Stockton is John's mother; Mr. Stockton is John's step-father. The trial, before a jury, lasted two weeks, at the end of which seven interrogatories were answered by the jury.

The paramount question is — WHAT DO THE ANSWERS TO THESE INTERROGATORIES MEAN? WHAT WAS THE JURY'S VERDICT?

The Trial Court and the Fifth Circuit both concluded that the jury's answers completely wipe out Altman, a 50% partner in a $2,300,000 partnership, when at all times Altman had $210,433 (after tax dollars) in his capital account, owed to him by the partnership.

It is respectfully submitted that no serious analytical and logical construction of the jury's answers to the interrogatories, weighed and checked against the facts in this case, can *totally* wipe out Altman's interest, because it had two natures:

a) The right of a partner to his capital account, which is the debt obligation (as distinguished from an equity obligation) of the partnership to a creditor-partner.

b) The right of a partner to his equity interest in the partnership.

Even if there is some possible construction that the jury intended to take away from Altman all of his equity interest in the partnership, UNDER NO CONSTRUCTION WHATSOEVER DO THE JURY FINDINGS DEPRIVE ALTMAN OF HIS CAPITAL ACCOUNT.

The Questions

1. Will the Supreme Court of the United States require that the lower courts follow the accepted and usual course in judicial proceedings with regard to jury findings, to the end that the judgment be consistent with the jury's fact findings and the record? (U.S. Constitution, Article VII).

2. Will the Supreme Court of the United States instruct the lower courts that no person (Altman) shall be deprived of his property without due process of law? (U.S. Constitution, Article V).

3. Will the Supreme Court of the United States decree that it is a deprivation of due process for the lower courts to improperly and illogically construe a fact finding by a jury in a civil matter? (U.S. Constitution, Article VII).

4. Will the Supreme Court of the United States instruct the lower courts that Congress has the power to lay and collect taxes on the income from a person; that no one pays taxes on the income of another; that income taxes were paid by Altman on his partnership income; that the remaining assets left by Altman in the partnership constitute his property, commonly referred to as his capital account; that the capital account is a debt of the partnership to Altman, as a partner — creditor; that the jury's answer to Interrogatory No. 1 (Yes, there is a partnership!) gave accord and recognition to Altman's interest in the partnership both as a partner-creditor and as an equity owner in the

net partnership assets? (U.S. Constitution, Article XVI; Interrogatory No. 1).

5. Will the Supreme Court of the United States reverse the Judgment of the United States District Court, Southern District of Texas, Corpus Christi Division, affirmed by the United States Court of Appeals for the Fifth Circuit (which stated that "Altman does have and take nothing against Cleveland J. Stockton and Dorothy Altman Stockton by reason of his demand for an interest in and an accounting with respect to the corporate stock, bank accounts, and other assets now standing in the names of Cleveland J. Stockton and/or Dorothy Altman Stockton") for the reason that the $2,300,000 of partnership assets held by the Stocktons included i) Altman's capital account of $210,433, his after tax dollars, plus ii) Altman's 50% equity ownership in the net partnership assets, on the grounds that there was no finding by the jury which deprived Altman of these two separate and independent interests in the partnership assets? (Interrogatories No. 2 and No. 7, Interpretation and Logic).

6. Will the Supreme Court of the United States instruct the lower courts that Interrogatories No. 2 through No. 7 were defensive questions; that neither the lack of ambiguity nor the presence of ambiguity in Interrogatories No. 2 through No. 7 can in any way deprive Altman of his capital account, the sum of $210,433 owed by the partnership to him as a creditor-partner? (Interpretation and Logic).

7. Will the Supreme Court of the United States properly find that there is no ambiguity in the jury's answers to Interrogatories No. 2 though No. 7; that sound interpretation and proper logic provide only one explanation to the jury's answers — that the jury's verdict calls for an accounting, as a result of which:

a) Altman will get his capita account of $210,433 as a creditor-partner;

b) Altman will get his 50% equity interest in net partnership assets as of April 30, 1961, totaling $1,034,968;

c) Altman will not get his 50% equity interest in the asset growth of the partnership after April 30, 1961; that is, in $1,265,014 of enhanced value of partnership assets after dissolution on April 30, 1961 ($2,300,000 less $1,034,968);

that equity requires the remanding of this case for an accounting consistent with this jury verdict? (Interpretation and Logic).

8. In the alternative, will the Supreme Court of the United States find that any ambiguity, apparent or otherwise, which might exist renders the jury findings inconclusive and can only be construed to create a doubt as to how the entire partnership assets should be divided and is therefore not conclusive in favor of the Stocktons to the detriment of Altman, requiring a new trial or other equitable relief? (Interpretation and Logic).

CONSTITUTIONAL AND OTHER PROVISIONS INVOLVED

This case involves the constitutional provisions cited below, verbatim in all parts here pertinent:

> No person shall . . . be deprived of . . . property, without due process of law. (U.S. Constitution, Amendment V)
> In suits of common law . . ., the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any court . . . than according to the rules of common law. (Constitution of the United States, Amendment VII).
> The Congress shall have the power to lay and collect taxes on incomes . . . (Constitution of the United States, Amendment XVI).

This case involves authorities and references to the transcript and record of the proceedings, set forth, in part, in Appendix D.

STATEMENT OF THE CASE

The partnership was formed in 1950 between John Altman and Mr. and Mrs. C. J. Stockton (Mrs. Stockton had been divorced from John Altman's father and had married C. J. Stockton, who, as a Louisiana citizen had previously obtained an Arkansas divorce from his mentally incapacitated wife domiciled in Louisiana).

The partnership consisted of two operations, a wine brokerage business and a stock investment business. Altman handled the wine business from New Orleans, and Stockton handled the investments from Corpus Christi, where he elected to make his home after the Arkansas divorce. All accounting matters were handled by Mr. Stockton in Corpus Christi through his accountant, Weldon Ripley.

Initially, the partnership was called The Stockton Company — A Partnership (Exhibit P 3). In 1953 the name was changed to The Stockton-Altman Company (Exhibit P 5).

The Statement of Condition of the partnership on January 1, 1950 is shown on Exhibit P 3. Stockton set up the securities trading account as an asset of the partnership in his name (Accounts Receivable — C. J. Stockton) and he did all trading in his name for convenience. The initial capital accounts of the partners were: C. J. Stockton — $3,022.35; Dorothy Altman Stockton — $9,858.82; and John Altman — $0.00. John was a 50% partner.

When Stockton prepared and signed the 1959 Stockton-Altman partnership return (Exhibit P 12) for December 31, 1959, the capital accounts were as follows: C. J. Stockton — $257,038.30; Mrs. C. J. Stockton — $77,514.99; Eleanor Altman Curran — $107,521.35. (John's sister had acquired her interest from Mr. and Mrs. C. J. Stockton); John Altman — $187,619.35. John still had his 50% partnership interest.

Mrs. John (Josie) Altman was subjected to some mother-in-law problems in 1958, after which John Altman received a draft of a will from the Stocktons, with the request that he sign this will leaving a major portion of his (Altman's) interest in the partnership to the Stocktons, rather than to his wife and children (R 575; Exhibit P 17). Altman's relationship with the Stocktons became somewhat difficult after he refused to sign the will; however, in November 1960, Mrs. Stockton became angry with her son. She learned that John had visited his father, a country lawyer, and had been with him at Mr. Altman's deathbed, even though she had previously forbidden her children to have anything to do with their father (R 162).

Shortly thereafter, during early 1961, the Stocktons had their lawyer prepare a partnership settlement agreement which Altman refused to sign. The Stocktons wanted John to keep the wine business which had no assets and earnings of about $15,000 per year (R 180) and they would keep the stocks valued at $1,405,727 and subject to a $370,741 bank loan (a net of $1,034,986). Whereas, the wine business had been very profitable during the early fifties and had provided substantial cash for investments, adverse conditions during 1959 and 1960 caused the wine business profits to decline, and thereafter most of the partnership profits came from the stocks.

When he refused to sign the settlement agreement during the last week of April 1961, Altman was sent the 1960 partnership tax return and a FINAL return dated April 30, 1961. With a "mickey-mouse" account-

ing entry by his accountant, Rippy, Stockton had reduced Altman's capital account to a minus $28,714 as of December 31, 1960 (Exhibit P 14), even though the gain in Altman's capital account was over $22,000 during 1960. Altman actually had $187,619 in his capital account at the end of 1959 and these were all after tax dollars. Additional gains in his capital account show that as of April 30, 1961, Altman was owed $210,443 by the partnership. This money belonged to Altman; the tax returns show that he had paid taxes for eleven years and this is what was left from his income. It constituted a receivable by him from the [illegible]. Additionally, at all times and particularly at April 30, 1961, John had a 50% interest in the net worth of the partnership (after payment of all debts and partners' capital accounts). Between April 30, 1961 and the time of the trial in 1969 the net sum of $1,034,986, identified as Accounts Receivable — C. J. Stockton, which had been kept by Mr. C. J. Stockton under his control, grew in value to approximately $2,300,000.

Although the Stockton-Altman Company had been unilaterally dissolved by the filing of the final return on April 30, 1961, there was no termination of the partnership. In order to have a settlement of partnership affairs and subsequent distribution of the partnership equity, Altman sued his mother and step-father (at the eleventh hour, just before the six year statute of limitations would have run) for an accounting in New York where the Stocktons were living. While these proceedings were pending, the Stocktons moved back to Texas and filed the case at bar on May 22, 1967, asking for a declaratory judgment to the effect that John Alt-

man (and Eleanor Curran) had no interest in assets standing in C. J. Stockton's name. John Altman submitted himself to the jurisdiction, filed a counter claim, and abandoned the New York suit.

By agreement, in the pretrial order John Altman was recast as the plaintiff; the Stocktons and Eleanor Curran (a nominal party) were recast as defendants.

Seven interrogatories were presented to the Jury (R 1339). In answer to the first interrogatory, the Jury found that the partnership as contended for by Altman did in fact exist (R 1340). This issue had been hotly contested during the trial by the Stocktons who admitted to their business dealings with John Altman extending over a period of eleven years but denied that it constituted a partnership. Instead, they contended it was only a device to save the Stocktons taxes (R 69). Also, they denied that the capital account shown in their tax returns to belong to John Altman belonged to him in fact. (R 1305).

The other six interrogatories related to the five defenses urged by the Stocktons to Altman's suit for accounting. These defenses were settlement, estoppel, accord and satisfaction, laches and waiver. The Jury answered the interrogatories covering settlement, estoppel, accord and satisfaction and laches (apparently) as requested by the Stocktons and the one on waiver in favor of Altman (R 1343-1347). The Stocktons had originally pleaded the statute of limitation to Altman's suit for accounting, but they formally waived this de-

fense in open court at the commencement of the trial (R 84).

After the verdict of the Jury was received and filed and before entry of Judgment, John Altman filed Request for Findings of Fact and Conclusions of Law (R 1348) together with an affidavit (R 1357) recounting for the Court the substance of an interview counsel for Altman had with the foreman of the Jury. In connection with this matter it was requested that the Court give due consideration to such request for findings and conclusions and to such affidavit, afford both Parties the right to oral argument and the filing of briefs, and thereafter make such written findings under Rule 52, F.R.C.P., as were proper. The Stocktons filed a reply (R 1359) to Altman's said request and resisted Altman's effort to have the foreman of the Jury appear as well as his request for findings and conclusions. Alternately, the Stocktons requested that the Court make findings and conclusions in their favor. Briefs were filed by both sides in an effort to support their respective positions (R 1367 - 1371). All such matters were heard by the Court on May 16, 1969, at which time the Court refused to request the attendance of the Jury foreman and proceeded to enter judgment for the Stocktons (R 1376). Within ten days after judgment, Altman filed a Motion to Amend Findings and Judgment and Alternatively to Grant a New Trial (R 1378). The Stocktons filed opposition (R 1394) to such motion and Order (R 1400) was entered on July 8, 1969, overruling in its entirety Altman's motion. On August 6, 1969, John Altman filed Notice of Appeal (R 1401) and Cash Deposit of $250.00, to serve as security for costs on appeal (R 1402). After the granting of an ex-

tension of time for filing the record on appeal (R 1403), the record in this case was filed with the Clerk of the Fifth Circuit Court on November 6, 1969. The Fifth Circuit Court affirmed the lower court and denied the request for a rehearing.

Testimony and Motives

During the trial, the Stocktons denied that a partnership ever actually existed between themselves and John Altman. Mr. Stockton referred to it as follows: "a family agreement" (R 649); "not a sham" (R 649); "not a partnership" (R 651). His attorney referred to it as a "tax device" (R 69) and his accountant testified "it was a family association for allocation of income" (R 875); "a family organization, a family association, a family joint venture" (R 942). Mrs. Stockton testified that no partnership had existed — that Mr. Altman was always on "a salary, a flexible salary" (R 850).

In spite of the Stocktons' denials that a partnership ever existed between them and Mr. Altman, the fact remains their accountant, Mr. Rippy, prepared partnership tax returns for them each year from 1950 through April 30, 1961, and they represented to the government under oath that John Altman was a 50 per cent partner in the firm (Exhibit P 3 through P 14). It was Mr. Stockton's responsibility to go by and see Mr. Rippy each year to have him prepare the tax returns (R 641) and he was the only one of the partners that dealt with Mr. Rippy over the years (R 661). Mr. Rippy confirmed that he had dealt with Mr. Stockton 90 per cent of the time, but had some correspondence with Mr. Altman concerning his own tax returns (R

966 & 967). Neither Mr. Rippy nor the Stocktons could ever reasonably explain at the trial why they had inserted the word "partnership" in the tax blanks rather than one of their other words of description nor could they reasonably explain why Mr. Altman was shown taking capital gains on stock sales if he did not own an interest in the stocks. Also, Mr. Rippy could not reasonably explain his theory that all money left in the business by Mr. Altman became the Stocktons' money (R 955-957). Mr. Minyard, C.P.A., called to testify by Mr. Altman, refuted these tax theories of Mr. Rippy and the Stocktons (R 470-480; 497-499). According to Mr. Minyard, there is no diference in tax practice between a family partnership and any other kind of partnership (R 504-507). They all must have substance and be real if a tax advantage is to be claimed.

The partnership in question was formed in 1950 although the Parties had talked about the idea in 1949 (R 108). At that time, Mr. Stockton was about 56 or 57 years of age and Mr. Altman was about 23 or 24. There is much conflict in the testimony of the Parties about why it was formed. Altman explains that the Stocktons had married in 1948 and were living in Corpus Christi, Texas, in 1949 and 1950. Because the wine business was in New Orleans, Mr. Stockton had been forced to run the business through a manager, a Mr. Marion Verlander and this was unsatisfactory, as the wine growers whom he represented were unhappy (R 110-111). Also, Mr. Verlander had been attempting to steal the business from the Stocktons by spreading the word around that Mr. Stockton had left the State of Louisiana and could not return for legal reasons (R

105). Another reason given Altman was the fact that the Stocktons had a $60,000.00 note to pay in New Orleans that was secured by their stocks (R 109-110). Also, there was the fact that Mr. Stockton felt he should not return to New Orleans because he was afraid his own children might make trouble for the present Mrs. Stockton if anything ever happened to him (R 112-116). It seemed the first Mrs. Stockton was in an insane asylum in New Orleans and he was afraid his Arkansas divorce from her might not be recognized under Napoleonic law (R 113). Later in the trial it was developed that Mr. Stockton had testified in the Arkansas divorce proceeding that he had no property in the State of Louisiana (R 744-746). Altman testified that he was offered a partnership involving the wine business and the stocks and he agreed to go (R 115-116).

Mr. Stockton testified that Verlander was attempting to steal the wine business, (R 754-755). However, Mr. Stockton claimed that the wine growers he represented were satisfied with the way Mr. Stockton was running the business (R 755). Although the wine business was a sales business, Mr. Stockton testified that it was not necessary for him to be near his market — in fact, he said he could have operated the business almost from Hong Kong (R 755). He simply used the long distance telephone lines to make sales (R 627-629). Mr. Stockton testified that it was Mrs. Stockton's idea and her oldest daughter's idea that John Altman go to New Orleans (R 757), and that he went to work on a salary basis (R 758-759).

To conclude that John Altman did not work for the

wine business for eleven years on a salary basis one need only look to the tax returns sworn to by Mr. Stockton. They show Altman participating in 50 per cent of the wine commissions and in the capital gains and dividends from the stocks. Also, they show his equity building up in his capital account so that he had $187,619.35 on a cost basis by December 31, 1959 (Exhibit P 12). Also, in 1958, Altman drew $45,000.00 out of his capital account and bought a house (R 152-153), and the money was raised through the sale of stocks.

If there was any intent on the Stocktons' part to use the partnership as a tax dodge or as a tax device to save themselves money, there is no testimony that John Altman ever knew anything about it (R 122-123). Mr. Stockton dealt with Mr. Rippy and they kept sending Altman copies of the tax returns each year representing to the federal government and to him that he owned 50 per cent of all profit from the stocks and the wine business. The two letters (Exhibit P 24 and P 25) read into evidence at the trial (R 681-686), both written by Mr. Stockton to Mr. Altman, one dated October 26, 1956, and the other dated April 22, 1960, seem to indicate quite clearly that Mr. Altman had a real partnership interest in the stocks.

It seemed that Mr. and Mrs. Stockton were pleased with the way John Altman ran the wine business as Mr. Stockton testified he "had a lot of confidence in John up to the time" John refused to sign Plaintiff's Exhibit 16 (R 694-695). This was in April, 1961. Before that happened, Mr. Stockton thought "Mr. Altman was a qualified man" (R 764).

According to Altman, the trouble between the Stocktons and him seemed to develop in 1958, when Mrs. Altman was five months pregnant with her fourth child (R 569). It would appear from the testimony of Mrs. Curran (R 1155-1157) and Mrs. Altman (R 569-575) that Mrs. Stockton objected to her children having children of their own. The incident that started things on the wrong track in 1958 took place at the Altman's home in New Orleans during a visit by the Stocktons who had just come to town. Mrs. Stockton testified that it was merely a little fuss (R 636-637), and Mr. Stockton testified it was just some unpleasantness (R 634-636). Both were quite vague about what really occurred but they denied that Mrs. Stockton attacked Mrs. Altman. However, Mrs. Altman said Mrs. Stockton became disturbed immediately upon seeing her condition and got more excited with time until she finally came at Mrs. Altman's throat. Mr. Stockton restrained his wife but she then got free and proceeded to chase Mrs. Altman up the stairs (R 569-575). Mrs. Altman was able to get free of Mrs. Stockton by locking herself in the bedroom.

Mrs. Altman testified that this 1958 incident seemed to relate to an earlier incident which took place after the birth of her third child in 1954. Before a group of relatives in Gulf Shores, Alabama, Mrs. Stockton said in dead seriousness: "If Josie has any more babies, I am going to disown her" (R 575).

Within a week after the 1958 incident, Mr. Altman received a will from the Stocktons with a request he sign it (R 575; Exhibit P 17). Had he signed this will

it would have left the major portion of Mr. Altman's interest in the partnership to the Stocktons rather than to his wife or children. Although the Stocktons' attorney said his clients wanted Mr. Altman to acknowledge in his will that if anything happened to him the stock was Mr. Stockton's and the wine business was Mr. Altman's (R 71), the Stocktons both denied sending Plaintiff's Exhibit 17. (He - R 633; and she R 810-822). Mr. Altman testified that things between him and the Stocktons became a little difficult after he refused to sign the will (R 157-162).

In November, 1960, the relationship between the Parties became even worse when John Altman went to visit his own father who was on his death bed (R 162). When Mrs. Stockton learned of this she became angry because she had forbidden all of her children to have anything to do with their father. This testimony of Mr. Altman was confirmed by Mrs. Curran (R 1157-1158). It was shortly after this that the Stocktons had their lawyer prepare Plaintiff's Exhibit 16 (R 163). John Altman refused to sign this document and after he advised the Stocktons of his refusal he received Plaintiff's Exhibits 13 and 14 (R 165). A reading of Plaintiff's Exhibit 16 makes it quite clear that the Stocktons had been involved in some form of a partnership with John Altman. At the trial, Mr. Stockton testified that this document was correct (R 706). Although the Stocktons contended at the trial that John Altman received the wine business after April 30, 1961, as a compromise settlement, this document (Exhibit P 16) recites on page 1 that, by virtue

of unusual efforts the partner John Altman has earned the ownership of the manufacturers' agency business operated in New Orleans.

John Altman never made the contention that he had come to own the wine business as the Stocktons contended. Rather he tendered them an accounting with respect to it just as he asked for an accounting from them with respect to the other assets (R 1327, Pre-Trial Order). Attorney for the Stocktons told the Jury in connection with his opening statement that Mr. Altman had been given the wine business as his property in the middle or late fifties (R 71). Mrs. Curran made a similar claim (R 1129-1131).

Although John Altman made it clear that he would not abandon his interest in the other partnership assets by signing the dissolution agreement (Exhibit P 16) and thereby taking the wine business, the Stocktons contend that his conduct after April 30, 1961, indicates that he agreed to accept the same and relinquished all interest in the stocks and other assets of the partnership. If this were true, Altman entered into a fool's bargain as the wine business had no real assets, no trucks, no inventory, a small office and no contract with the wine growers they were representing (R 104-106). Mr. Altman testified that the wine business could not be sold for anything as there was no contract to sell (R 177-178). The business grossed $24,137.41 in 1961 and showed a net profit of about $15,000.00 (R 180). The stocks on the other hand had a gross value in 1961 of $1,405,727.76. As there was a loan at the bank at that time of $370,741.99, the stocks

had a net value of $1,034,985.77. Of course, if there had been an accounting at that time between the partners, Altman would not have been entitled to a full one half of $1,034,985.77 because the Stocktons would have been entitled to receive back their initial contribution first, and each partner his capital account, before a division was made. The gross value of their contribution in 1950 was $239,691.25 against which there was a $60,000.00 note which the partnership later paid off. Therefore, the Stocktons' net contribution was $179,691.25 which should have been deducted first from the $1,034,985.77 leaving a net balance of $855,294.77. Without an accounting, one cannot know whether John Altman would have been entitled to one half or more or less than one half of the $855,294.77 net value, but it can be seen that as a 50 per cent partner for the eleven years such value was accumulated his interest in the stocks would have far exceeded the value of the wine business.

Before discussing the effort that Altman made to get an accounting from the Stocktons after April 30, 1961, and before suit was filed, a look should be had at the way Altman's capital account was handled on the 1960 partnership return. Although Altman was shown at the end of 1959 to have a net worth of $187,-619.35 (Exhibit P 12) which represented earnings he had left on deposit over the years for reinvestment, the 1960 return (Exhibit P 13) showed he had minus $28,714.84 or a reduction in his capital account of $216,-334.19. Neither of the Stocktons was able to explain this bookkeeping procedure although they were sure he had not drawn this money out of the firm in 1960

(Mrs. Stockton at R 807-810; Mr. Stockton R 710-718). Mr. Altman testified he never drew out anything like $216,000.00 (R 193-194).

The Stocktons do not contend and there is no evidence in the record that John Altman ever expressly agreed after April 30, 1961, to accept the wine business and give the Stocktons his interest in the stocks. Rather, the Stocktons seem to contend that his conduct after April 30, 1961 indicates such an intention on his part. The Stocktons testified that they had visits with Mr. Altman thereafter but the matter was never discussed (R 772-775). On the other hand, John Altman testified that he did contact the Stocktons about getting the matter straightened out. According to him, Mr. Stockton requested that he wait and let some time pass — "Let Mother get back to normal. This thing will blow over". (R 166-169). Mr. Stockton did not deny saying these things to Mr. Altman — rather he testified he did not remember anything like that (R 774). Altman testified that he had gone twice to visit the Stocktons about the matter, had telephoned them and had written a number of letters (R 183-186). These two trips were made to New York City where the Stocktons finally took up residence in September, 1963 (R 183-186) and continued to live there until 1967 when he filed his lawsuit in the state court of New York State (R 184). He testified they put their home in Corpus Christi up for sale in 1962 or 1963, or around that time (R 185). Mr. Altman testified further that he checked on the statute of limitations in New York State for his case and it was a six year statute, so

he waited before filing suit because he hated to take it into court and he advised the Stocktons of this by letters (R 186-188).

When the Stocktons filed the final return in April, 1961, and furnished a copy to Mr. Altman, they also cut off the checking account. (R 304-306). Thereafter, John Altman opened a new bank account and continued to manage the wine business. He testified that he felt he had no choice but to do this. (R 309-310). Also, the company name was changed to "John A. Altman Company" (R 309). In doing these things Mr. Altman felt that he had been given no choice. (R 174-177).

The record in this case is devoid of any evidence showing or tending to show that the Stocktons would suffer a material detriment from any delay involved in bringing this suit for accounting. The note at the bank has been paid down to $60,000.00 and these payments were made out of the income from the stocks (R 769). The Stocktons attempted to prove detriment at the time of trial by showing what might have happened to them had the value of the stocks decreased in value after April 30, 1961 (R 769-771). Actually no such thing ever occurred as the net value of the stock at the trial was well over $1,000,000.00. Mr. Stockton would not say exactly what it was worth but he said they might be worth $1,300,000.00 or $1,400,000.00 (R 793-794). Of course, these estimates would be just $60,000.00 from being net figures. In April, 1961, the net figure had been $1,034,985.77.

The Seven Interrogatories

Interrogatory No. 1

Do you find from a preponderance of the evidence that John Altman and the Stocktons formed a partnership in 1950 as the term "partnership" has been defined for you by the court, and that John Altman was to share 50% in the profits of both the wine business and the stock investments and be liable for 50% of the losses of each?
Answer: "Yes" or "No".
If you have answered Interrogatory No. 1 "Yes" then continue to answer the following additional interrogatories as instructed. If you have answered Interrogatory No. 1 "No", then you need answer no further interrogatories and your "No" answer to Interrogatory No. 1 shall constitute your entire verdict.

Interrogatory No. 2

Do you find from a preponderance of the evidence that in 1961 or thereafter, the Stocktons and John Altman expressly or impliedly agreed that as his share of the partnership, John Altman would thereafter keep and operate the wine business as his separate property and the Stocktons would keep the stocks?
Answer: "Yes" or "No".

Interrogatory No. 3

Do you find from a preponderance of the evidence that after April 30, 1961, John Altman's conduct, wheth-

er by act, word or silence, was reasonably calculated to and did lead the Stocktons to believe that he had accepted the wine business as his net share of the partnership and did not intend to make any further claims against him?
Answer: "Yes" or "No".
If you have answered the foregoing Interrogatory No. 3 "Yes", then answer Interrogatory No. 4. If you have answered Interrogatory No. 3 "No", then skip Interrogatory No. 4.

Interrogatory No. 4

Do you find from a preponderance of the evidence that John Altman would gain an advantage that he was not otherwise entitled to or that the Stocktons would suffer a detriment they would not otherwise suffer if John Altman were now allowed to change his position and to demand more than the wine business?
Answer: "Yes" or "No".

Interrogatory No. 5

Do you find from a preponderance of the evidence that the disagreement between the Stocktons and John Altman was settled in 1961 or 1962 by an express or implied agreement between them that Altman would take the wine business as his sole property and that the Stocktons would keep the corporate stock?
Answer: "Yes" or "No".

Interrogatory No. 6

Do you find from a preponderance of the evidence that John Altman waited for a longer period of time than a person of ordinary prudence would have waited before demanding an accounting and that events occurred during the period of the delay such that the Stocktons cannot be put back in the position they were in on April 30, 1961, without injustice to the Stocktons? Answer: "Yes" or "No".

Interrogatory No. 7

Do you find from a preponderance of the evidence that after April 30, 1961, but before January 1, 1966, John Altman, with full knowledge of such claims as you may find he had to the assets other than the wine business intentionally gave up such claims? Answer: "Yes" or "No".

The Jury answered "Yes" to Interrogatories Nos. 1, 2, 3, 4, 5, and 6 and "No" to Interrogatory No. 7.

With these answers, the District Court and the Appellate Court both held that the Stocktons could keep all the stocks (bank accounts, cash and other assets) valued at approximately $2,300,000 and Altman should keep the wine brokerage business which had no assets but which was capable of making $15,000 a year utilizing Altman's full time at work. It may be noted here that the partnership had total taxable income of $78,280.48 in 1960 (P 13) and $37,669.57 for the first four months of 1961 (P 14). It may also be noted that the Stocktons have enjoyed the dividends, profits, and

capital gains from the stocks from April 30, 1961 to date.

The partnership assets consist of stocks and cash plus a wine agency business. If the stocks and cash are likened unto a horse and the wine business unto a rabbit; then John Altman is getting the rabbit. This Court says this is so because the jury, the fact finders, said John must get the rabbit. BUT IS THIS WHAT THE JURY SAID? NO, IT IS NOT!

What the jury really said is that John must get his capital account as of dissolution of partnership (April 30, 1961), plus his part (50%) of the partnership net worth after all partners' capital accounts are paid (as of April 30, 1961).

Using the 1959 tax return (P 12), which was the last accurate return before the "mickey mouse" entries were made by Stockton, and assuming all partnership assets totaled $1,000,000, this is how the jury meant to settle the partnership
(ACCORDING TO THEIR ANSWERS TO THE INTERROGATORIES).

CONDITION OF PARTNERS' CAPITAL ACCOUNTS AT DECEMBER 31, 1959

C. J. Stockton	15%	$ 257,038.30
Mrs. C. J. Stockton	15%	77,514.90
John Altman	50%	187,619.35
Eleanor Altman	20%	107,521.35
Total Net worth of partners' capital accounts		$629,693.90

VALUE OF PARTNERSHIP EQUITY AT DECEMBER 31, 1959

Total Assets		1,000,000.00
Due to Partners		629,693.90
Partnership net worth or equity		$ 370,306.10

LIQUIDATING DISTRIBUTION TO PARTNERS:

C. J. Stockton	15%	$ 55,545.91
Mrs. C. J. Stockton	15%	55,545.92
John Altman	50%	185,153.05
Eleanor Altman	20%	74,061.22
		$ 370,306.10

Using these figures as an example, the jury wanted John to get $187,619.35, plus $185,153.05, or $372,772.40 out of the estimated $1,000,000 on hand. What the jury said is that John Altman should get the foregoing type of accounting as to all partnership assets as of April 30, 1961. The jury also said that it did not want John to get the benefit of all enhanced stock values after April 30, 1961 (although he might possibly be entitled to interest on his money since the Stocktons used Altman's money after April 30, 1961). In other words, John was not to get the benefit of the values above $1,034,986 (net assets on April 30, 1961). John was not to get a share of the $1,265,014 increment (stocks were worth approximately $2,300,000 in 1969), which represented the enhanced value of the stock after April 30, 1961.

None of the Interrogatories spoke of the bank accounts and other assets; yet, the Trial Court judgment "carefully" included these unknown partnership assets among those to be kept by the Stocktons. The mere existence of bank accounts, cash and other assets for which the Stocktons have not accounted is additional reason for supporting Altman's argument, urged in this petition.

REASONS FOR GRANTING THE WRIT

The Fifth Circuit Court Opinion

The opinion of the Fifth Circuit Court does not adequately attempt to analyze the jury's verdict. It leaves out a lot and assumes a lot. It is urged that this illogical opinion deprives Altman of his property without due process, for due process does require reasonable utilization of mental powers in logical interpretation of the jury's fact findings. Let us examine some of the lower court's statements.

1. At page 2 of the opinion, the Fifth Circuit said: "On May 22, 1967, Cleveland J. Stockton and his wife Dorothy, instituted this suit against John A. Altman — seeking a declaratory judgment".

NOTE:— This statement makes the Stocktons out to be the aggressors. However, in April of 1967, Altman sued the Stocktons in New York, their residence, and after being served in New York, they cancelled the lease on their apartment and returned to Corpus Christi

where they had sold their house four years earlier. New York had a six year statute of limitations and John waited until the last month to sue his mother and stepfather. He had no objection to meeting the Stocktons in Texas, which had a four year tolling statute.

2. At page 4 of the opinion, the Fifth Circuit said:
"In its verdict the jury, in answer to special interrogatories found that a partnership had existed between the parties, that there had been a settlement of accounts between the parties in 1961; that Altman was estopped from claiming more than the wine business, which he had accepted as his net share of the partnership assets; and that Altman was barred by laches from asserting in 1967 a claim for an accounting".

NOTE: The Fifth Circuit cannot say that the jury found anything like this. This is really what the jury found:

(a) That a partnership was formed in 1950, with Altman as a 50% partner in profits and losses. See Interrogatory No. 1;

(b) In 1961 or thereafter Altman agreed that *as his share of the partnership* he would thereafter kept the wine business and Stockton the stocks. See Interrogatory No. 2. This is totally difference from the Fifth Circuit words that "there had been a set-

tlement of accounts". Altman's SHARE of the partnership could only refer to his 50% partnership equity interest. It could not refer to his capital account which was his ASSET interest. And if the jury found that Altman was EXPRESSLY OR IMPLIEDLY giving up his share of equity, was it the share he had earned as of date of dissolution, April 30, 1961, or was it the share after April 30, 1961, or was it both? Certainly, Altman resisted signing the agreement proffered by Stockton on April 26, 1961, when he returned it several days later. This was express resistance to settlement. Nothing happened to change the implication of that non-signing before April 30, 1961, the date of dissolution, when Stockton moved ahead under the rule of CAN DO. The only implication that the jury could consider was Altman's operation of the wine business separately after May 1961. And, since the 'settlement' concept requires intention, consider how the jury answered Interrogatory No. 7 — "after April 30, 1961, but before January 1, 1966, did John Altman with full knowledge as you may find he had to the ASSETS other than the wine business intentionally gave up such claims?" The jury knew that Altman had his capital account (part of the ASSETS) and the jury knew Altman had his 50%

partnership equity up to April 30, 1961 (his SHARE of the partnership).

(c) The jury did not say John Altman was 'estopped' from claiming more than the wine business, as the Fifth Circuit claims. Interrogatory No. 3 and No. 4 attempted to set up the equitable defense of estoppel. The estoppel concept requires material detriment to the Stocktons and none was shown in the evidence. The Trial Court and the Fifth Circuit both avoided this issue of detriment. This is fallacious. Potential loss or speculative injury is not enough, and not even that was shown! Notice also that Interrogatory No. 3, a predicate to No. 4, talks about Altman's net SHARE of the partnership (meaning net share of equity). There is no reference here to his interest in ASSETS, which Altman owned by virtue of his capital account, as a partner-creditor of the partnership. His assets were 'after tax' dollars derived from income.

(d) The jury never said Altman was barred by laches in 1967. Interrogatory No. 6 would be an attempt to set up the defense of laches. This is an 'equitable' concept requiring damage or injury to the Stocktons, and no such evidence was developed. While the jury may have felt the Stock-

tons could not be put back in the same position they were in on April 30, 1961, without injustice to them, that is understandable because the Stockton's now held $2,300,000 in stocks at the time of the trial. Certainly it can be construed a detriment for someone to have to release something under his control, but here, the jury did not want Stockton to release the entire $2,300,000. Rather, the net partnership worth of $1,034,968 on April 30, 1961 was all the jury wanted Altman to look to. Maybe a more prudent person than Altman would have sued earlier, but John waited until the statute of limitations was about to run, for he felt constrained to sue his mother only as a last resort.

3. At page 7 of the opinion, the Fifth Circuit said: "Admittedly, the case involves some difficult concepts. We think, however, the jury unquestionably was competent to unravel and answer those issues establishing the right of Altman to an accounting."

NOTE: We submit that the jury's logic in answering the seven interrogatories proves that Altman should get an accounting as of April 30, 1961. See Jury's Logic hereinafter. The Fifth Circuit (erroneously) read more into the jury's answers than they can support in the face of a careful analysis of the seven answers:

4. At pages 8 and 9 of the opinion, the Fifth Circuit said:

> "That in the absence of a motion notwithstanding the verdict made at trial, the Court cannot examine the evidence for sufficiency."

NOTE: First, the argument as to the jury's logic will show that Altman was entitled to an accounting as of April 30, 1961; therefore, the point about asking for a judgment NOV is not well taken. Second, the point may be well taken as to Altman's entitlement to part of those assets in the range above $1,034,986 up to $2,300,000; however, to determine its pertinence, we must examine the record as to why Altman elected to ask for a new trial rather than judgment NOV. Altman's main contention was that the judgment (wiping him out) could not stand because of the apparent ambiguity between Interrogatory Nos. 2 and 5 on one hand, with Interrogatory No. 7. This, conflict properly dictated the need for a new trial (insofar as it eliminated his claim to part of the assets above $1,034,986). Interrogatories No. 2, No. 5 and No. 7 dealt with contractual concepts requiring intention of each party, the absence of which is shown by the NO answers to Interrogatory No. 7. The total absence of evidence showing detriment to the Stocktons with respect to Interrogatory No. 3 and No. 4 (estoppel) and Interrogatory No. 6 (laches) would, if it had been standing alone, called for a judgment NOV; but these two equitable concepts (not requiring intention) also could only attack Altman's claim to assets above $1,034,986, and the rule of Parker v. American Oil Co., 5th Cir.

1964, 327 F 2d 987 is not applicable. The existence of any conflict calls for a new trial, and it as not a proper situation for granting judgment in favor of either party.

5. At pages 11 and 14 of its opinion, the Fifth Circuit said:

> "We believe any inconsistency in the controverted answers is more apparent than real".

NOTE: Because something is apparent does not mean it is not real. We submit that the jury's logic is real, and the only real (logical) construction which can be accorded their answers to the seven interrogatories calls for Altman to get an accounting with respect to partnership assets on hand at April 30, 1961. Two other things are real: i) the jury wanted Altman to keep the wine business as part of that accounting settlement; and ii) the jury did not want Altman to enjoy advantages in asset growth between the $1,034,986 level and the $2,300,000 level (the 'enhanced' value of the stocks).

Jury's Logic

Did the jury use the logic of the hat-check girl? Did the Fifth Circuit use the logic of the Harvard professor? Consider the incident which came about when the Harvard professor of logic gave his hat to the hatcheck girl at a large restaurant. He received no ticket in return, and he was uneasy throughout dinner, for he had seen his hat placed among sixty others. His anxiety was apparent by the way he rushed

to the hat check room after dinner, where the girl immediately handed him his hat.

> "How did you know this was my hat?", he exclaimed.
> "Sir, I did not know this was your hat", she replied.
> "Then, why did you give it to me?" he retorted.
> She answered, "Sir, because you gave it to me when you came in!"

What was the jury telling the Court through its answers to the seven interrogatories. Analyze the answers logically; otherwise, they are inconclusive.

No. 1. Partnership — Yes
No. 2. Settlement — Yes
(words used were: "in 1961 or thereafter _____ *as his share of the partnership*")
No. 3. Estoppel (a) — Yes
(words used were: "after April 30, 1961 _____ did lead _____ *as his net share of the partnership*".)
No. 4 Estoppel (b) — Yes
(words used were: "would suffer a detriment")
No. 5. Accord and satisfaction — Yes
(words used were: "disagreement _____ settled in 1961 or 1962)
No. 6. Laches — Yes
(words used were: "Stocktons cannot

be put back in the position they were in on April 30, 1961, without injustice to the Stocktons)

No. 7. Settlement (Waiver) — No.
(words used were: "After April 30, 1961, but before January 1, 1966, John Altman, with full knowledge of *such claims* as you may find he had *to the assets* other than the wine business intentionally gave up such claims.")

INTERROGATORY NO. 1

After Interrogatory No. 1 was answered *Yes*, Altman was entitled to an accounting. The jury knew from the expert testimony of Ernest Minyard (CPA of Peat, Marwick, Mitchell & Co.) that this accounting called for a listing of all assets and liabilities, and that the assets had to be paid out to satisfy liabilities in the following manner:

1st Debt: to the repayment of partnership debts and obligations due third parties.

2nd Debt: to the repayment of advances made by partners.

3rd Debt: to repayment of partnership capital account obligations due the partners for the monies advanced by each as investment capital, as of April 30, 1961.

4th Residue: Then, the remaining assets arising primarily from *enhanced value of* stock, plus, cash, accounts receivable or other assets found — 50% to Altman and 50% to Stocktons and daughter. (Note: While this cash item is not apparently large, there is nevertheless, some cash on hand at April 30, 1961 and the existence of this asset — being neither wine nor stocks — makes it incumbent on the Court as a legal proposition to order an accounting, regardless of how the wine and stocks are treated).

At this point, the jury knew there was a partnership, knew that the partnership owed Altman his capital account (3rd debt above), and the jury knew that Altman would get 50% of enhanced value assets on hand at July 1969 (trial date) remaining out of the $2,300,000 on hand. The jury had evidence from testimony of Ernest Minyard, CPA of Peat, Marwick, Mitchell & Co. as to how *Altman's share of the partnership* would be computed. Minyard had gone to the blackboard and worked out the computation of *Altman's share of the partnership*, for the jury.

Minyard stated twice, in addition to his blackboard computation, which started at 2:00 P.M. on the day he testified, in essence as follows: "The capital account of the partner (Altman) is a debt of the partnership". Minyard elaborated (and wrote on the blackboard) that in order to compute *Altman's share of the partnership* the following debts would have to be paid first, and in this order:

(a) debts to third parties — i.e. the bank
(b) advances by partners — i.e. the Stocktons' advance, by stocks put up in 1950
(c) Capital accounts of partners — i.e. Altman (as well as the Stocktons)

After the payment of all these debts, Minyard went on to show what was Altman's share of the partnership as a 50% partner. He computed the value of the partnership by subtracting the debts (a+b+c) above from the total value of the partnership assets. Since Minyard's example was based on 1959 figures (from the balance sheet, at cost) it reflected that Altman's share of the partnership was 50% of approximately $360,000 ($1,450,000 stock values less all debt, the total of a+b+c) at December 31, 1959.

ALTMAN

But the jury did not want to have his capital account and his 50% equity at April 30, 1961, *plus 50% of the 'enhanced' value of stocks after April 30, 1961* (after payment of 1st, 2nd and 3rd debts). If the jury had wanted to wipe Altman out completely it had merely to give a No answer to Interrogatory No. 1 or a Yes answer to Interrogatory No. 7. So, what did the jury do?

INTERROGATORY NO. 2

To cut Altman off from the 'enhanced' values after April 1961, the jury had to answer *Yes*. This Yes answer that Altman agreed to keep the wine business as his share of the partnership appeared proper to the jury since "share of partnership" meant Altman's share of the 4th residue after April 30, 1961. CPA

Minyard had shown them that a partner's capital account is a 3rd debt of the partnership to a partner. Thus the jury was not depriving Altman of his capital account and equity up to April 30, 1961, but it was depriving Altman of his 50% equity share (4th residue after April 30, 1961) — in exchange for the wine business, that is, $2,300,000 less $1,034,986 or $1,265,014 in exchange for a wine business making $15,000 per year. Maybe this is not too harsh a punishment accorded a son who felt constrained to sue his mother and stepfather.

INTERROGATORIES NO. 3 AND NO. 4

These are the estoppel interrogatories. Since the jury meant to let John have his accounting as of April 30, 1961, and cut him off from 'enhanced' values beyond that date (in exchange for the wine business) their logical answer was *YES* to both Interrogatories. The key words to the jury here are "share of the partnership", which they knew treated only with (4th residue) 'enhanced' values; consequently, John's capital account was still safe for him (3rd debt). As to the detriment under Interrogatory No. 4, the jury had heard no evidence of detriment to the Stocktons, for the Stocktons had over $1,034,986 net value in stocks under their control at April 30, 1961, plus earnings therefrom for over eight years, and finally approximately $2,300,000 left. But the words "Stocktons would suffer a detriment and not otherwise suffer *if John Altman were now allowed to change his position*" were strong words from the Judge letting them believe that John had intended to keep the wine business only. This is contrary to the evidence, and coming from the Judge

was prejudicial. It was a typical "when did you stop beating your wife" question, to which Altman objected, but to no avail. Nevertheless, the jury was not too concerned because this answer did not impinge on the debt of the partnership to Altman (3rd debt). It is respectfully submitted that it was improper for Judge Seals to advise the jury that John was claiming the wine business (Interrogatory No. 4). It is an improper comment on the evidence to assume the existence of a controverted fact in submitting a special issue to the jury; and this defect is not cured simply by submitting such special issue conditioned upon the jury's answer Yes or No to a proceeding special issue. However, the way the jury applied its logic it only strengthened their decision to let Altman keep the wine business, but not share in $1,265,014 (4th residue after April 30, 1961).

INTERROGATORY NO. 5

A *Yes* to this question did not bother the jury since it deprived John only of his part of 'enhanced' value or residual worth (4th residue). The partnership's debt to Altman was still protected. Remember, the jury knew that some of the partnership assets consisted of cash. There was also something relaxing to the jury in that the Trial Court was using the singular (corporate stock).

INTERROGATORY NO. 6

A *Yes* to this question presented no problem to the jury since they had gotten the message from the Court that John was not looking for more than the wine

business *after April 30, 1961*, and Altman was protected through April 30, 1961 by his capital account (3rd debt) and his 50% equity interest in a mere $1,034,968 of partnership assets.

NOTE: Interrogatory No. 3 and No. 4 (estoppel) and Interrogatory No. 6 (laches) are equitable concepts, not requiring intent; therefore, the law demands that there have been an advantage to one party or detriment to the other, before applying these equitable concepts. And this injustice, advantage or detriment, must be material, actual, and real, not speculative or one that may potentially arise. There is absolutely no evidence to support detriment or injustice to the Stocktons; yet, the lower courts merely skip the issue, never coming to grip with it.

INTERROGATORY NO. 7

A *Yes* answer to Interrogatory No. 7 would have wiped John out; however, the jury could now insure that the Trial Court understand that John was to receive a partnership accounting through April 30, 1961 — simply by answering NO. After April 30, 1961, Altman did not give up any claim he had to *assets*, other than the wine businss. Realize here that the words *share of partnership* are not present. The key word is *assets*. And CPA Minyard had established for the jury that Altman had a claim for his capital account (3rd debt) plus a claim for 'enhanced' value (4th residue), as of date of dissolution of the partnership.

The Fifth Circuit, using Harvard professor logic, made two assumptions as to Interrogatory No. 7, to wit:

a) "*If the jury concluded* that he (John) had no claims, a conclusion for which there exists support in the record, a No answer would properly follow"; and

b) "*If the jury believed* that by the end of April 1961, the expressed or implied agreement had been consummated, it is likely they would have concluded Altman had nothing to give up after April 30, 1961 — so a No answer was proper".

Altman's answer to these two "ifs" is that there is absolutely nothing in the record to support these "ifs."

Interrogatory No. 7 referred to partnership assets. Certainly, Altman's capital account was a partnership asset (3rd debt) and he never gave this up. He refused to sign the partnership settlement agreement (P 21) and returned it to Stockton shortly after April 26, 1961. Nothing more happened until after April 30, 1961, when the partnership was terminated unilaterally by Stockton who mailed the partnership FINAL tax return to Altman about the first week of May 1961. (See R 163-165; R 694-695; R 708-709).

Stockton himself admitted that John did not accept the proposal (P 21). This was Stocktons testimony, at Page 708:

Q. Mr. Altman refused to sign it, did he not?
A. Correct.
Q. And he returned it to you?
A. I imagine he did. You know, I don't keep all those records. I presume he did; he refused to sign it, yes.

Then, at Page 709, Stockton answered further on cross-examination:

Q. So no one signed it.
A. It was important for him to sign it and he refused to do it.
Q. That's when you filed the final return, right?
A. *That's when it was time to get rid of him.*
Q. That is when you lost confidence in him, right?
A. That would make anybody lose confidence.
Q. That is when you lost confidence in him, right?
A. That's right.
Q. That is when you filed the final return, correct?
A. Correct.

These were Stockton's words. It was time to get rid of him (Altman), after he returned the settlement agreement *unsigned*, about April 30, 1961. How can the Fifth Circuit use the words "if the jury concluded" and "if the jury believed" that Altman had no claim and nothing to give up by the end of April 1961? Altman, Stockton and the jury all knew that Altman had a big claim (3rd debt and 4th residue) to the parternship assets as of April 30, 1961, and the jury said (Interrogatory No. 7) that Altman *did not* intentionally give up such claims to the assets. The jury also knew Altman had paid income taxes on his partnership earnings and that he had $210,443 left in his partnership capital account. The "No" answer to Interrogatory No. 7 recognizes John's claim to *partnership assets*. Prior interrogatories had been more restrictive in that they talked about *share of partnership after April 30, 1961*.

CONCLUSION

The existence of the partnership gave Altman, automatically, as a matter of law a right to an accounting as of the date of dissolution (April 30, 1961), plus a right to an accounting between the date of dissolution and the date of termination of the partnership. Although dissolved, the partnership is still not "terminated". For this distinction see Partnership 68 CJS 898, Section 385 (c). Defensive Interrogatories No. 2, No. 3, No. 4, No. 5, No. 6, and No. 7 were designed to wipe Altman out of *all* of his partnership assets. The Jury having had an accounting lession from CPA Minyard logically answered the seven special interrogatories and communicated: (1) that John should get his accounting with respect to his capital account and 'enhanced' value up to and through April 30, 1961, the date of dissolution; (2) that as to assets after dissolution, even though the partnership was not yet terminated, Altman would keep the wine business in exchange for 'enhanced' value or additional partnership worth after April 30, 1961. This is the fair, equitable and logical conclusion from the jury's verdict. Any other construction cannot resolve the "apparent" ambiguities. Any other rationale would render the jury findings inconclusive and require a new trial. However, this Honorable Court can render a judgment reflecting (1) and (2) above on the record as it now stands.

In the alternative, it is urged that Altman is entitled to a new trial because of prejudicial comment by the trial court and/or on the grounds of irreconcilable conflicts and ambiguities, as may be found to exist by this Honorable Court. A new trial will permit Altman

to prove his right to assets and partnership worth beyond the date of dissolution up to termination of partnership.

WHEREFORE, Petitioner prays that this petition for a Writ of Certiorari to the United States Court of Appeal for the Fifth Circuit be granted to the end that there be judgment herein ordering an accounting between the partners of Stockton-Atlman Company, with respect to all assets as of April 30, 1961, under which accounting Altman will be recognized as a creditor of of the partnership with respect to the principal amount due in his capital account, and further that Altman will be entitled to 50% of any residual or net worth assets of the partnership as of the date of dissolution, April 30, 1961.

In the alternative, Petitioner prays that a new trial be granted, and for all just and equitable relief.

s/ _____

James H. Morrison
1002 American Bank Building
New Orleans, Louisiana 70130
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Of Counsel:

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CERTIFICATE OF MAILING

I, James H. Morrison, as one of the attorneys of record for Petitioner, do hereby certify that a true copy of the foregoing petition has been served upon the following attorneys at the addresses respectively shown below on the 20th day of January, 1971 by mailing to each such attorney in an envelope containing said petition with the postage thereon prepaid:

Richard A. Hall, Esquire
Messrs. Branscomb, Gary, Thomasson & Hall
101 Hawn Building
Corpus Christi, Texas

Stone, Tilley, Parker, Shakard, Law & Brown
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New Orleans, Louisiana 70130

s/ _____
James H. Morrison

APPENDIX "A"

JUDGMENT

IN THE
DISTRICT COURT OF THE UNITED STATES
FOR THE SOUTHERN DISTRICT OF TEXAS
CORPUS CHRISTI DIVISION

CLEVELAND J. STOCKTON AND
DOROTHY ALTMAN STOCKTON

CIVIL ACTION

versus **No. 67-C-65**

JOHN A. ALTMAN AND
ELEANOR ALTMAN CURRAN

This cause came on for trial before a jury on March 17, 1969. At the conclusion of the evidence, all contested issues were submitted to the jury upon special interrogatories which the jury answered and which special interrogatories and answers are on file among the papers in this cause.

Subsequent to the receipt of the jury verdict, a motion was filed by John A. Altman requesting the court to file findings of fact and conclusions of law. The motion is denied. The court is of the opinion that the issues tried to the jury were properly so tried and that the jury verdict is binding upon the court. In this respect, the court expressly finds that this cause was placed upon the jury docket for trial more than six months before the actual commencement of the trial with the

knowledge and acquiescence of all parties. The court further finds that the pre-trial order and supplemental pre-trial order in this cause, approved by all parties, contemplated a jury trial of the contested issues of fact set forth therein with no suggestion or objection being made that the fact issues were not properly triable to a jury or that the jury verdict in the cause was to be advisory only. At the pre-trial hearing in the cause, a discussion of the manner of trial took place and it was agreed that the case would be submitted to a jury upon special interrogatories. The court was advised that no findings of fact and conclusions of law would be filed by the parties prior to the commencement of the trial, as is the court's requirement in non-jury cases, since the case was being tried to a jury. The court further finds that none of the parties hereto suggested or intimated to the court at any time until after the jury verdict had been received and a motion for judgment thereon filed that the jury verdict should be considered as advisory only and that the court should file findings of fact and conclusions of law.

The court is of the opinion that the jury verdict should be treated as being binding upon the court and that judgment should be entered thereon. Were the court not of the opinion that the jury verdict was binding, the court would find that John Altman, Cleveland J. Stockton and Dorothy Altman Stockton did not form a partnership at any time as alleged and contended by John Altman and would further find as facts those same facts which were found by the jury in answer to interrogatories numbers 2, 3, 4, 5 and 6.

It is, therefore, ORDERED, ADJUDGED and DECREED that the petition for declaratory relief filed herein by Cleveland J. Stockton and Dorothy Altman Stockton be granted, that the counterclaim filed herein by John A. Altman against Cleveland J. Stockton and Dorothy Altman Stockton be denied, and that John A. Altman do have and take nothing against Cleveland J. Stockton and Dorothy Altman Stockton by reason of his demand for an interest in and an accounting with respect to the corporate stock, bank accounts and other assets now standing in the names of Cleveland J. Stockton and/or Dorothy Altman Stockton.

It is further ORDERED, ADJUDGED and DECREED that no relief be granted to or against Eleanor Altman Curran herein.

All costs of this proceeding shall be taxed against John A. Altman.

SIGNED this 16th day of May, 1968.

/s/ WOODROW SEALS
Woodrow Seals, United States
District Judge

ORDER OVERRULING MOTION TO AMEND FINDINGS AND JUDGMENT AND FOR NEW TRIAL

(Number and Title Omitted)

Filed: July 8, 1969

On the 7th day of July, 1969, came on for hearing the motion of John Altman that the court amend its findings of fact and judgment herein and alternatively that the court grant John A. Altman a new trial, and the court, being of the opinion that the various motions should be overruled and denied, it is, accordingly,

ORDERED that the motion of John A. Altman that the court amend its findings of fact and judgment be in all things denied and overruled. It is further

ORDERED that the motion of John A. Altman for a new trial be and the same is hereby denied.

To all of which action of the court John A. Altman excepted.

SIGNED this 8 day of July, 1969.

/s/ WOODROW SEALS
United States District Judge

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APPENDIX "B"

In the United States Court of Appeals
for the Fifth Circuit

No. 28,886

Cleveland J. Stockton and Dorothy Altman Stockton,
Plaintiffs-Appellees,

versus

John A. Altman,
Defendant-Appellant,

and

Eleanor Altman Curran,
Defendant.

Appeal from the United States District Court for the
Southern District of Texas

(September 22, 1970)

Before BROWN, Chief Judge, GEWIN and
THORNBERRY, Circuit Judges.

THORNBERRY, Circuit Judge: This is an appeal from a judgment in a Texas diversity action for a partnership accounting. The jury in the district court found that although a partnership between the parties had

existed, there was no right to an accounting. Accordingly, the district court rendered judgment for the defendants. We affirm.

On May 22, 1967, Cleveland J. Stockton and his wife, Dorothy, instituted this suit against John A. Altman and Eleanor Altman Curran seeking a declaratory judgment that the Stocktons were not indebted to either Altman or Mrs. Curran as the result of any business previously conducted by them. After filing his answer, Altman filed a counter complaint wherein he alleged that in 1950 he, his stepfather, Mr. Stockton, and his mother, Mrs. Stockton, had entered into a partnership agreement involving the operation of two businesses, a wine brokerage company headquartered in New Orleans, Louisiana, and a stock investment company headquartered in Corpus Christi, Texas. Altman further alleged that his sister, Mrs. Curran, joined the partnership in 1951 and that it was dissolved by the Stocktons in April, 1961, when they filed with the federal government a final tax return for the partnership. In addition, Altman prayed for an accounting of all the partnership assets and requested that he be given judgment for his portion thereof. In reply the Stocktons specifically denied that a partnership had ever existed and set forth the defenses of settlement, accord and satisfaction, estoppel, limitations and laches, and waiver. In a supplemental pretrial order the parties were realigned, Altman assuming the stance of plaintiff and Mrs. Curran and the Stocktons assuming the status of defendants. The trial court then directed that the jury trial be limited to those issues relating to Altman's right to accounting and provided that if

Altman were successful the matter was to be referred to an auditor.'

'The interrogatories submitted to the jury are as follows:

Interrogatory No. 1

Do you find from a preponderance of the evidence that John Altman and the Stockians formed a partnership in 1920 as the term "partnership" has been defined for you by the court, and that John Altman was to share 50% in the profits of both the wine business and the stock investments and be liable for 50% of the losses of each?

Answer: "Yes" or "No"

If you have answered Interrogatory No. 1 "Yes" then continue to answer the following additional interrogatories as instructed. If you have answered Interrogatory No. 1 "No", then you need answer no further interrogatories and your "No" answer to Interrogatory No. 1 shall constitute your entire verdict.

Interrogatory No. 2

Do you find from a preponderance of the evidence that in 1921 or thereafter, the Stockians and John Altman expressly or impliedly agreed that as his share of the partnership, John Altman would thereafter keep and operate the wine business as his separate property and the Stockians would keep the stocks?

Answer: "Yes" or "No".

Interrogatory No. 3

Do you find from a preponderance of the evidence that after April 30, 1921, John Altman's conduct, whether by act, word or silence, was reasonably calculated to and did lead the Stockians to believe that he had accepted the wine business as his net share of the partnership and did not intend to make any further claims against them?

Answer: "Yes" or "No".

If you have answered the foregoing Interrogatory No. 3 "Yes", then answer Interrogatory No. 4. If you have answered Interrogatory No. 3 "No", then skip Interrogatory No. 4.

Interrogatory No. 4

Do you find from a preponderance of the evidence that John Altman would gain an advantage that he was not otherwise entitled to or that the Stockians

In its verdict the jury, in answer to special interrogatories, found that a partnership had existed between the parties; that there had been a settlement of accounts between the parties in 1951; that Altman was estopped from claiming more than the wine business, which he had accepted as his net share of the partnership assets; and that Altman was barred by laches from asserting in 1957 a claim for an accounting. After

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would suffer a detriment they would not otherwise suffer if John Altman were now allowed to change his position and to demand more than the wine business?

Answer: "Yes" or "No".

Interrogatory No. 5

Do you find from a preponderance of the evidence that the disagreement between the Stockton and John Altman was settled in 1951 or 1952 by an express or implied agreement between them that Altman would take the wine business as his sole property and that the Stockton would keep the corporate stock?

Answer: "Yes" or "No".

Interrogatory No. 6

Do you find from a preponderance of the evidence that John Altman waited for a longer period of time than a person of ordinary prudence would have waited before demanding an accounting and that events occurred during the period of the delay such that the Stockton cannot be put back in the position they were in on April 30, 1951, without injustice to the Stockton?

Answer: "Yes" or "No".

Interrogatory No. 7

Do you find from a preponderance of the evidence that after April 30, 1951, but before January 1, 1952, John Altman, with full knowledge of such claims as you may find he had to the asset other than the wine business intentionally gave up such claims?

Answer: "Yes" or "No".

The jury answered "Yes" to Interrogatories Nos. 1, 2, 3, 4, 5, and 6, and "No" to Interrogatory No. 7.

the jury's verdict was received and filed but before entry of judgment Altman filed a request for findings of fact and conclusions of law, together with an affidavit recounting for the court the substance of an interview that Altman's counsel had with the jury foreman. On the basis of the affidavit Altman requested the court to interrogate the foreman in reference to the jury's answers to certain interrogatories. Both requests were denied. In addition, the court found that the issues tried to the jury were properly tried and that the jury verdict was binding. The judge stated, however, that if the verdict were not binding upon him he would find that no partnership existed. Furthermore, he indicated he would find the facts as found by the jury in their answers to Interrogatories Nos. 2, 3, 4, 5 and 6. After judgment was entered for the Stocktons, Altman filed a motion to amend findings and judgment and, alternatively, to grant a new trial. The motions were overruled.

This appeal raises seven points: Appellant Altman contends (1) that the jury's answers to the special interrogatories were not binding upon the court but merely advisory; (2) that there is insufficient evidence to support the jury's answers to Interrogatories Nos. 2, 4, 5 and 6, as well as the verdict based upon those answers; (3) that the court erred in submitting Interrogatory No. 4 to the jury over his objections; (4) that the answers to Interrogatories Nos. 2 and 5 are in irreconcilable conflict with the answer to Interrogatory No. 7; (5) that the trial court erred in refusing to call the jury foreman into open court to explain the jury's answers to certain interrogatories; (6) that laches was

not a proper defense; and (7) that the trial court's finding that no partnership was ever formed is clearly erroneous. We find no merit in appellant's first five points and thus find it unnecessary to reach his last two contentions.

I.

Appellant first argues that the district court erred both in giving binding rather than advisory effect to the jury's answers to the interrogatories and in denying his request for findings of fact and conclusions of law. As grounds for this contention appellant asserts that the accounts between the parties are of so complicated a nature that only a court of equity can satisfactorily unravel them. The Supreme Court, however, has noted that "In view of the powers given to the District Courts by Federal Rule of Civil Procedure 53 (b) to appoint masters to assist the jury in those exceptional cases where the legal issues are too complicated for the jury adequately to handle alone . . ." it will be a rare case in which a party can demonstrate that only a court of equity can unravel the accounts.[2]

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[2] "The necessary prerequisite to the right to maintain a suit for an equitable accounting, like all other equitable remedies, is, as we pointed out in *Beacon Theatres*, the absence of an adequate remedy at law. Consequently, in order to maintain such a suit on a cause of action cognizable at law . . . the plaintiff must be able to show that the 'accounts between the parties' are of such a 'complicated nature' that only a court of equity can satisfactorily unravel them. In view of the power given to District Courts by Federal Rule of Civil Procedure 53(b) to appoint masters to assist the jury in those exceptional cases where the legal issues are too complicated for the jury adequately to handle alone, the burden of such a showing is considerably increased and it will indeed be a rare case in which it can be met." *Dairy Queen, Inc. v. Wood*, 369 U.S. 469, 478, 82 S.Ct. 894, 900, 8 L.Ed.2d 44 (1962).

We disagree with appellant's assertion that this case falls into that extraordinary category. Admittedly, the case involves some difficult concepts. We think, however, the jury unquestionably was competent to unravel and answer those issues establishing the right of Altman to an accounting. Moreover, it was specifically provided that in the event the jury found Altman entitled to an accounting the matter would be referred to a master, who, under an appropriate order, would audit the records and accounts of the parties and file with the court a report describing the status of the accounts. We thus believe this case falls within the scope of jury competence and find that under the standards enunciated by the Supreme Court in *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500, 79 S.Ct. 948, 3 L.Ed.2d 988 (1959) and *Dairy Queen, Inc. v. Wood*, 369 U.S. 469, 82 S.Ct. 894, 8 L.Ed.2d 44 (1962), appellee was entitled to a jury trial as a matter of right.[3] Regardless of whether a jury trial was required as a matter of course, however, it was proper here because appellant consented to it. Rule 39(c), Fed. R. Civ. P., contemplates that in actions not triable of right by a jury, the court, with the consent of both parties, may order a trial with a jury whose verdict has the same effect as if trial by jury had been a matter of right.[4]

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[3] *See also Swofford v. B & W, Inc.*, 5th Cir. 1964, 336 F.2d 406, *cert. denied* 379 U.S. 962, 85 S.Ct. 653, 13 L.Ed.2d 557 (1965) and *Thermo-Stitch, Inc. v. Chemi-Cord Processing Corp.*, 5th Cir. 1961, 294 F.2d 486.

[4] Fed. R. Civ. P. 39 (c) provides as follows:

> Advisory Jury and Trial by Consent. In all actions not triable of right by a jury the court upon motion or its own initiative may try any issue with an advisory jury or, except in actions against the United States when a statute of the

The district court expressly found that this cause, with the knowledge and acquiescence of all parties, was placed upon the jury docket more than six months before the actual commencement of the trial. Both the pretrial order and the supplemental pretrial order contemplated a jury trial of the contested issues of fact, and at the pretrial hearing it was agreed that the case would be submitted to a jury upon special interrogatories. Indeed, the district court found that none of the parties suggested or intimated to the court at any time prior to the receipt of the jury verdict and the filing of a motion for judgment thereon that the jury verdict should be considered as merely advisory. Upon reviewing the record we find no error in the court's conclusions that appellant consented to a jury trial and that the verdict should be treated as binding.

II.

Appellant next urges that the evidence is insufficient to support the jury's answers to Interrogatories Nos. 2, 4, 5, and 6 as well as the verdict based upon these answers. The question of sufficiency of the evidence, however, was not preserved by a proper motion. It is well settled, as we held in *Delchamps, Inc. v. Borkin*, 5th Cir. 1970, ____ F.2d ____ [No. 29231, slip opinion dated July 28, 1970], that in the absence of a motion for judgment notwithstanding the verdict made at

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United States provides for trial without a jury, the court, with the consent of both parties, may order a trial with a jury whose verdict has the same effect as if trial by jury had been a matter of right.

trial, this Court cannot examine the evidence for sufficiency. *See Parker v. American Oil Co.*, 5th Cir. 1964, 327 F.2d 987. Even if the question had been properly preserved for our review, we, nevertheless, would find no merit in appellant's contention. This Court in considering a sufficiency question is required to accept all evidence in favor of the verdict as true and to give that evidence the benefit of all permissible inferences that help sustain the jury's decision. *Lyle v. Bentley*, 5th Cir. 1969, 406 F.2d 325; *Southern Pacific Co. v. Jordan*, 5th Cir. 1968, 395 F.2d 209; *Employers Mutual Casualty Co. v. Mosqueda*, 5th Cir. 1963, 317 F.2d 409. When these standards are applied to the case at bar it becomes quite apparent that there is indeed sufficient evidence to sustain the controverted answers and verdict.

III.

Thirdly, appellant contends that Interrogatory No. 4 was improperly worded and asserts that it created prejudice, depriving him of a fair trial on the other interrogatories. We disagree. The interrogatory in question was phrased as follows: "Do you find from a preponderance of the evidence that John Altman would gain an advantage that he was not otherwise entitled to or that the Stocktons would suffer a detriment they would not otherwise suffer if John Altman were now allowed to change his position and to demand more than the wine business?" Appellant reasons that the interrogatory was prejudicial in two ways: (1) It implied that Altman had accepted and did claim the wine business as his own and thus advised the jury

that it should answer Interrogatories Nos. 2 and 5 in the affirmative; and (2) it indicated to the jury that Altman was taking a basically unfair position in claiming all the wine business and at the same time wanting the appellees to share the stocks with him.

In making this contention appellant overlooks the posture of the case at the time the jury reached Interrogatory No. 4. Throughout the course of the trial Altman's position indicated he was asking for more than the wine business. Moreover, Interrogatory No. 4 was submitted to the jury conditioned upon an affirmative answer to Interrogatory No. 3, which inquired of the jury whether John Altman's conduct after April 30, 1961, was reasonably calculated to and did lead the Stocktons to believe that he had accepted the wine business as his net share of the partnership and did not intend to make any further claims against them. Not until they answered "yes" to that inquiry did the jury proceed to Interrogatory No. 4, wherein inquiry was directed to whether Altman would gain an unwarranted advantage or the Stocktons would sustain a detriment if Altman were now allowed to demand more than the wine business. Consequently, in view of Altman's position during the trial and the facts found by the jury before it considered Interrogatory No. 4, we believe the district court committed no prejudicial error in wording the interrogatory as it did.

IV.

Appellant next argues that the answers to Interrogatories Nos. 2 and 5 irreconcilably conflict with the an-

swer to Interrogatory No. 7. In answer to Interrogatory No. 2 the jury found that "... in 1961 or thereafter, the Stocktons and John Altman expressly or impliedly agreed that as his share of the partnership, John Altman would thereafter keep and operate the wine business as his separate property and the Stocktons would keep the stocks." In answer to Interrogatory No. 5, the jury found that "... the disagreement between the Stocktons and John Altman was settled in 1961 or 1962 by an express or implied agreement between them that Altman would take the wine business as his sole property and that the Stocktons would keep the corporate stocks." Interrogatory No. 7 was worded as follows: "Do you find from a preponderance of the evidence that after April 30, 1961 but before January 1, 1966 John Altman, with full knowledge of such claims as you may find he had to the assets other than the wine business intentionally gave up such claims?"

In response to Interrogatory No. 7 the jury answered "no." Appellant construes this answer as a finding that Altman did not intentionally give up his claims to assets other than the wine business after April 30, 1960, but before January 1, 1966, and reasons that it conflicts with Interrogatories Nos. 2 and 5 because without such intention as the jury in Interrogatory No. 7 found not to exist, Altman could not have entered into a settlement (Interrogatory No. 2) or an agreement of accord and satisfaction (Interrogatory No. 5). We do not agree with appellant's construction of the answer. Rather, we believe any inconsistency in the controverted answers is more apparent than real.

We begin consideration of this issue with the proposition that this Court is duty bound to reconcile or harmonize answers to interrogatories if it can reasonably do so. *Safeway Stores, Inc. v. Dial*, 5th Cir. 1961, 288 F.2d 53. Indeed, "... a search of one possible view of the case which will make the jury's finding inconsistent results in a collision with the Seventh Amendment." *Atlantic & Gulf Stevedores v. Ellerman Lines*, 369 U.S. 355, 364, 82 S.Ct. 780, 7 L.Ed.2d 798 (1962). Explicit in Interrogatory No. 7 is the question whether John Altman after April 30, 1960, and before January 1, 1966, had any claims to give up. If the jury concluded that he had no such claims, a conclusion for which there exists support in the record, a "no" answer to Interrogatory No. 7 not only would properly follow but also would not conflict with the answer to Interrogatory No. 2. That the jury in reality did reach the preceding conclusion is likely. From their answers to Interrogatories Nos. 2 and 5 it is apparent the jury believed that an express or implied settlement and agreement between the parties was consummated prior to April 30, 1961. Moreover, the jury found in answer to Interrogatory No. 3 that Altman's conduct after April 30, 1961, was calculated to and did lead the Stocktons to believe that he had accepted the wine business as his share of the partnership. In view of these findings the jury might very well have concluded that Altman, having expressly or impliedly agreed on or prior to April of 1961 that the Stocktons would keep the stocks and he the wine business as his share of the partnership assets, simply had no claims to give up after April 30, 1966. Examined in this light the answers appear untainted with conflict.

There likewise exists no irreconcilable conflict between the jury's answers to Interrogatories Nos. 5 and 7. In Interrogatory No. 5 inquiry is directed to whether the disagreement between the Stocktons and Altman was settled in 1961 or 1962 by an express or implied agreement between them that Altman would take the wine business as his sole property and the Stocktons would keep the corporate stock. If the jury believed that by the end of April, 1961 the express or implied agreement had been consummated, it is likely they would then have concluded Altman had nothing to give up after April 30, 1961. Accordingly, the proper answer to Interrogatory No. 7 would be "no." There may be other explanations for the jury's answers, but we believe it unnecessary to delve into them since the preceding analysis demonstrates that there exists no irreconcilable conflict.

V.

Appellant also urges that the district court erred in refusing to call the jury foreman into open court to explain the conflict between the answers to Interrogatories Nos. 2 and 5 and the answer to Interrogatory No. 7. As authority for his request appellant cites *Freid v. McGrath*, 135 F.2d 833 (D.C. Cir. 1943). We note, though, that the cited case involved a latent clerical error in recording the jury verdict. Neither party has suggested that the jury in the instant case made a mistake in reducing its verdict to writing and we do not believe the case supports appellant's position. Moreover, the trial judge found no irreconcilable conflict and, consequently, saw no need to ask the jury

to clear up the conflict. Since we have determined that any conflict in the answers is more apparent than real, we are unable to agree with appellant that the trial court abused its discretion in not granting his request.

In conclusion, we have found no clear error in the judgment below; rather, we are firmly of the opinion that it is correct.

AFFIRMED.

APPENDIX "C"

PER CURIAM: The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the Petition for Rehearing En Banc is DENIED.

APPENDIX "D"

AUTHORITIES AND REFERENCES INVOLVED

1. On the questions of "settlement" and "accord and satisfaction".

Interrogatory No. 2 (settlement) and Interrogatory No. 5 (accord and satisfaction) are in effect dual submissions of virtually the same defensive theory. Both

require the element of intent, which must be proved by direct evidence. Any circumstantial evidence tendered by the Stocktons does not meet the legal test.

In his Request For Findings Of Fact, Appellant asked that the Trial Court reject the jury's answer to Interrogatory No. 2 (R 1349, Para. 4), and reject the jury's answer to Interrogatory No. 5 (R 1351-1352, Para. 10). The Trial Court was requested to make actual findings contrary to the findings of the jury to these two Interrogatories. After judgment, Appellant asked that the Trial Court amend its alternative findings that adopted the jury's answers to Interrogatories Nos. 2 and 5 and make contrary findings (R 1378, Para. 2 and R 1380, Para. 9). Also, Appellant sought a new trial on the grounds that both answers were without supporting evidence (R 1383, Para. 22 and R 1386, Para. 41). Alternately, it was requested that a new trial be given on the ground that these two answers are contrary to the clear weight of the evidence. (R 1383, Para. 23 and R 1386, Para. 42). This combined Request and Motion of Appellant was overruled by the Trial Court on July 8, 1969, (R 1400). In the request filed before Judgment and in the one filed after Judgment, Appellant pointed out to the Trial Court that there was an apparent conflict between the jury's answers to Interrogatories Nos. 2 and 5 on the one hand and Interrogatory No. 7 on the other. (Before Judgment — R 1348-1355, Paras. 4, 5 and 10) and (After Judgment — R 1378-1391, Paras. 26, 27, 28, 29, 55 and 56). This apparent conflict was pointed out to the Trial Court by Appellant when the verdict was tendered to the Court but before the jury had been discharged. (R 1243-1250).

Appellant excepted to the Trial Court's refusal to send the jury back to resolve the conflict (R 1249).

In *15 American Jurisprudence, 2d*, Section 2, at page 936, it is said:

> "The concept of compromise and settlement is closely related to such other concepts as accord and satisfaction, novation, release, and account stated. In many situations these concepts have significantly overlapped one another; they have been used synonymously and interchangeably; and there has been a semantic, but no substantive, distinction between them. In some situations, however, the distinctions are of substantive significance". Accord: 1 *C J S*, Sec. 1(2), page 464; 15A *C J S*, Sec. 1(1), page 172 and 1 *Tex. Jur.* 2d, Sec. 2, page 208.

More important than the fact that the distinction between the two defenses is mostly a technical one is the fact that both of them are contractual in nature and therefore involve intent or mutual assent, that is, a meeting of the minds. 12 *Tex. Jur.* 2d, Sec. 5, page 290; and 1 *Tex. Jur.* 2d, Sec. 6, pages 212 and 213.

In answering Interrogatory No. 7, the jury in this case found, in substance, that after April 30, 1961, but before January 1, 1966, John Altman did not intentionally give up his claims to assets other than the wine business. This answer is therefore in apparent conflict with the answers the jury gave to Interrogatories Nos. 2 and 5 because, without such intention as the jury

found here not to exist, John Altman could not have entered into a settlement and he could not have entered into an agreement of accord and satisfaction.

In addition to the foregoing reasons why the answers to Interrogatories Nos. 2 and 5 should not stand, there is the additional fact that there exists no substantial evidence of such a settlement or accord and satisfaction, or, if there exists some evidence to support such answers, then such findings are contrary to the clear weight of the evidence.

In the case at bar, there is no evidence that John Altman and the Stocktons ever expressly agreed, either before after April 30, 1961, to a settlement whereby he would keep the wine business and they would get to keep the stocks. The undisputed evidence simply shows that in April, 1961, Altman was in New Orleans operating the wine business and the Stocktons were in Corpus Christi and had possession of all the stocks belonging to the partnership. At that time, the Stocktons mailed Altman the document, identified as Plaintiff's Exhibit 16, to Altman and he refused to sign the same, whereupon the Stocktons mailed Altman copies of the 1960 tax return (Exhibit P 13) and the final tax return (Exhibit P 14) and by this unilateral action dissolved the partnership. As the document they wanted Altman to sign would have settled the partnership in the manner suggested by Interrogatories Nos. 2 and 5, it would have to be said that Altman did not settle at that time, because he expressly refused to give his assent to the terms proposed. Altman's testimony was that he continued to deal with the Stocktons after April

30, 1961, in an effort to get the partnership re-established or to get an accounting. On the other hand, the Stocktons do not say he thereafter told them he would keep the wine business and let them have the stock. Rather, they say he was completely silent about the matter.

Now, it is true that proof of an intention on Altman's part to keep the wine business after April 30, 1961, and to give the Stocktons the stock could theoretically be proved by circumstantial evidence. See *Ashby v. State*, (Civ. App. 1955) 283 S.W. 2d 270, 273. However, it is submitted that the evidence introduced for such purpose is not legally sufficient.

In the case of *Calvert v. Union Producing Co.*, (Civ. App. 1966) 402 S.W. 2d 221, the Texas rule on circumstantial evidence is set as follows, at page 227:

> "Where circumstances are equally consistent with the existence and nonexistence of an ultimate fact sought to be established, such circumstances are wanting in probative force as any evidence tending to establish the existence of the ultimate fact".

In the case of *Kirby Petroleum Co. v. Jones* (Civ. App. 1968) 427 S.W. 2d 681, the following is found at page 685:

> "A fact, however, may be established by circumstantial evidence. The circumstantial evidence is sufficient if on the basis of probabili-

ties it establishes the existence of the ultimate fact".

In the case of *Republic National Life Insurance Co. v. Bullard*, (Civ. App. 1966) 399 S.W. 2d 376, it is said at page 380:

> "However, a court or jury may not be left to speculate. The evidence must give use to more than a surmise or suspicion that death resulted solely from accidental injuries. If there is no direct evidence as to the existence of an ultimate fact and the proven circumstances are consistent with either of two theories and there is nothing to show that one rather than the other probably is correct, then neither is proven".

See also *Bledsoe v. Yarborough* (Civ. App. 1967) 422 S.W. 2d 222, 226 and 227; *Green v. Texas & P. Ry. Co.* 125 Tex. 168, 81 S. W. 2d 669; and 32A *C J S*, Sec. 1039, page 748 et seq.

The undisputed facts in this case are that the Stocktons left the wine business with John Altman after he refused to accept the same in April 1961. Therefore, no inference should be drawn from the fact that he continued to operate such business thereafter. No inference should be drawn from the fact that he opened a checking account after the Stocktons closed out their common checking account, as it is common knowledge that a business has to have a checking account to operate. Likewise it is submitted that no inference should be drawn from the fact that he opened such account

in his name in view of the fact that the Stocktons were making it quite clear at that time that they were not going to account to him for the proceeds they were receiving from the stock investments. What Altman did thereafter with his 1961 tax return was based upon the advice of his accountant and was sensible under the circumstances. Altman testified he could not continue to treat the matter as a true partnership for federal tax purposes where he was not receiving his part of the partnership income the Stocktons controlled.

The evidence is undisputed that Altman did contact the Stocktons by 1967 and attempt to get an accounting at that time (R 1267). Except for Altman's testimony that he continued to contact the Stocktons about getting it worked out from April 30, 1961, until the time he filed suit, there is no other evidence that would tend to prove nor disprove what his intention was during that period of time.

Consider, however, the evidence that would tend to prove that Altman had not agreed to the settlement proposed by the Stocktons. Of first importance is the fact that he flatly refused to sign the document identified as Plaintiff's Exhibit 16 which set out the kind of settlement contended for by the Stocktons. Secondly, it is difficult to believe that anyone in this circumstance would have accepted the wine business in lieu of Altman's share of the stocks which had a net value of 1,034,985.77 before the Stocktons were reimbursed for their initial contribution and a net value of $855,-294.77 after such contribution was deducted. Furthermore, the wine business had no inventory, no contract

and no capital assets to speak of, there was not much that the Stocktons could have given him in exchange for his part of the stocks. Obviously, Altman was in a position in April, 1961 to establish a wine business of his own in New Orleans had he elected to take his share of the stocks and go into business for himself. Therefore, why would he or anyone so situated make the kind of settlement the Stocktons contend for.

To say that the jury's answers to Interrogatories Nos. 2 and 5 were based on surmise or speculation is not to say enough about how nonsensical they were. Obviously, the jury would not have answered these Interrogatories as they did had the Trial Court not told them, over Appellant's objection (R 1225-1228), in connection with Interrogatory No. 4, that Altman had accepted the wine business and was attempting by his lawsuit to force the Stocktons to share the stocks with him. To place Altman in this unconscionable position in the eyes of the jury was to prejudice his whole case.

In the case of *Aetna Insurance Co. v. Paddock* (5th Cir. 1962), 301 F.2d 807, there was involved an appeal from an equitable proceeding for reformation of an insurance policy. In that case, it was held that, in equity matter, the trial court may submit to advisory jury such issues of fact as it sees fit, and may adopt or disregard any finding, but all findings must be treated merely as advisory. Also, it was held that the remedy where the court has adopted the findings of a jury is not for a new trial but to require the trial court to make independent findings of fact, enter judgment in accordance with those findings, and appeal there-

from. In the case at bar, Appellant followed this procedure and simply made his motion for new trial alternative to his request for amended findings. In the case of *Lumbermen's Mutual Casualty Co. v. Timms* (2nd. Cir. 1939) 108 F. 2d 497, 500, it is held that, where an advisory jury is used, the case on appeal is the same as if no jury had been present.

Rule 52, F.R.C.P., which covers findings by the Trial Court, provides that findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. This rule is discussed in *Encyclopedia of Fed. Prac.*, Vol. 14, Section 67.32.

In the case at bar it is submitted that the findings of settlement and accord and satisfaction are clearly erroneous because there is no substantial evidence to support these findings. Credibility would seem to have nothing to do with the question because, even if all of the Stocktons' evidence on this point is accepted and all of Altman's is rejected, the circumstantial evidence is not strong enough to support an inference that Altman agreed to relinquish his interest in the stock.

Should it be determined that there was some substantial evidence in support of the findings being discussed, it is still submitted that such findings are contrary to the clear weight of the evidence. In *Encyclopedia of Fed. Prac.*, Vol. 14, Section 67.32, it is said at page 236:

> "A finding is also 'clearly erroneous' within Rule 52(a) when, although there is some evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed".

If the verdict was not merely advisory, but rather was binding on the Trial Court, it is submitted that the answers to Interrogatories Nos. 2 and 5 should still be set aside as they are not supported by substantial evidence. In the case of *Greyhound Corp. v. Dewey* (5th Cir. 1957) 240 F. 2d 899, 902, the court points out that it is only where jury verdicts are based on conflicting evidence that they are binding on the appellate court. If there is no substantial evidence a question of law is presented and the reviewing court can do what the trial court should have done.

Even if it should be determined that there is some substantial evidence in support of these answers, this court should still reverse if it determines that the Trial Court abused its discretion in denying the motion for new trial. *Pruett v. Marshall* (5th Cir. 1960) 283 F.2d 436, 438.

2. On the questions of "estoppel" and "laches".

Interrogatories 3 and 4 (estoppel) and 6 (laches) are equitable defenses, not requiring the element of intent. In order for these defenses to prevail the element required is the showing of detriment to the Stocktons, if Altman were given the accounting he seeks.

Appellant objected to the form in which Interrogatory No. 4 was submitted to the Jury because it falsely represented that John Altman was demanding the wine business in toto as his own (R 1344). This submission was highly prejudicial to Altman because it made it appear that his position was completely inequitable in that he not only wanted to keep the wine business all to himself but he wanted to get an accounting from the Stocktons and make them share the stocks with him. Objection to this Interrogatory was made by Appellant before it was submitted (R 1225-1228), and was overruled (R 1228). Altman had tendered the Stocktons an accounting with respect to the wine business (R 1327, Para. 4) and he was therefore bound by this in such a way that his position was not open to misinterpretation by the Court.

All three of these Interrogatories were answered in the affirmative. It is Appellant's position that the answers to Interrogatories Nos. 4 and 6 should have been rejected or disregarded by the Trial Court because, although detriment is an element of each such defense, there is no evidence in the record from which detriment can be inferred. The answer to Interrogatory No. 3 should have been disregarded because it would be rendered immaterial by a setting aside of the answer to Interrogatory No. 4. If it should be determined that the answers to Interrogatories Nos. 4 and 6 are supported by substantial evidence, then it is Appellant's alternative position that such answers are nevertheless contrary to the clear weight of the evidence and that the Trial Court erred in adopting such answers or that the Trial Court abused its discretion in not granting Appellant's Motion For New Trial.

After verdict and before Judgment, Appellant requested that the Trial Court make fact findings contrary to the answers given by the jury to Interrogatories Nos. 4 and 6 (R. 1351, Para's. 8, 9; R 1352-1352, Para. 12). After Judgment, Appellant requested that the Trial Court amend its findings with respect to these matters (R 1380, Para. 7; R 1381, Para's. 11, 12) or alternatively that a new trial be granted because of the lack of evidence supporting the same (R 1385, Para's. 34, 35, 36, 37; R 1386, Para's. 43, 44, 45, 46 and 47).

With regard to estoppel, the following is found in 22 *Texas Jurisprudence*, Section 16, at page 683.

> "Estoppel is always predicated on the conception that the pleader thereof has been mislead to his prejudice by some statement, act or conduct of another who seeks to assert a right inconsistent therewith. Thus, one material element of an estoppel is that the party claiming it must have been mislead by the misrepresentations or conduct of the opposite party to change his position in such a manner that he will be injured if estoppel is not declared. No estoppel is predicable of acts or statements of the defendant where it is not shown that the conduct of the plaintiff has in any respect been influenced thereby to his prejudice in some material aspect".

In 28 *American Jurisprudence*, 2nd, Section 78, at page 716 it is said:

> "The injury or prejudice involved must be actual and material and not merely technical or formal".

Under footnote 15 of the same article, the following appears on page 717:

> "Estoppels are never based upon conjectures; the law requires that facts be presented showing substantial damages sustained".

Accord: the Texas case of *Bell v. Moody* (Civ. App. 1941) 147 S.W. 2d 852; and 31 *CJS*, Section 74, at page 451, where it is said:

> ". . . and where no available right is parted with and no injury suffered there can be no estoppel in pais".

On the other hand, laches has been defined as follows:

> "Laches, in legal significance, is not mere delay but delay that works a disadvantage to another".

See 35 *Tex. Jur.* 2d, Sec. 10, page 470. See also: *Turner v. Hunt*, 131 Tex. 492, 116 S.W. 2d 688, 117 *A L R* 1066; *Ft. Worth v. Johnson* ____Tex____, 388 S.W. 2d 400; *In Re Casco Chemical Co.* (5th Cir. 1964) 335 F. 2d 645, where it is said at page 651:

> "Laches is an equitable doctrine and must reckon with actualities".

In the case at bar, Appellant seeks an accounting as of April 30, 1961. As the jury found that he was a 50 per cent partner in the firm in question, his interest built up over eleven years is quite sizeable. Now, this is a suit in equity and therefore the result should first of all be equitable. If Appellant should ultimately lose, then the Stocktons get to keep all of the money Appellant left in for reinvestment, which is $210,443.26 (Exhibit P 21) and this is to say nothing of the growth realized over the eleven years such money was invested. Whatever delay was involved in bringing this suit for accounting inured to the benefit of the Stocktons — it worked no detriment upon them, because such delay meant they could use Appellant's money that much longer. The evidence is undisputed that the stock increased in value after April 30, 1961, up to the date of trial.

The Stocktons' theory of detriment was a speculative one — they complained of what might have happened if the value of the stock had fallen after April 30, 1961. The fact is, however, the value did not fall! The cases cited stand for the proposition that estoppel and laches deal with realities — not surmise — not speculation. To mean anything the detriment must have been in fact suffered! The Stocktons say they paid the loan down from $600,000.00 to $60,000.00. Well, they did this with stock that belonged to Appellant as well as to themselves! Actually, the record shows that there was always sufficient stock on hand to pay the loan off at any time.

At the beginning of the trial, the Stocktons formally waived the statute of limitations (R 84). The effect

of this was to waive laches as well or to render it immaterial because, in Texas, the limitation upon bringing suit for accounting is set out by statute. See Article 5527, Section 3, Vernon's Civil Statutes of Texas. To the Stocktons' plea of limitations, John Altman had alleged that the statute of limitations was tolled while the Stocktons were out of the State of Texas. See Pre-Trial Order (R 1327, Para. 5) and Original Counter-Complaint (R 1287, Para. 7). As the Stocktons left Texas and moved to New York State in September, 1963, the suit for accounting was not barred in Texas when the Counter-Complaint was filed on January 4, 1968 (R 1283), because the Stocktons were still residing in New York when Altman filed his suit up there in April, 1967.

The case of *Atkins v. Dodds* (Civ. App. 1938) 121 S.W. 2d 1010 holds that where alleged cause of action, either legal or equitable, comes within any specific provision of the statute of limitations, then the equitable defenses of laches and stale demand do not apply and the statute of limitations governs and must be pleaded. In accord: *Hendricks v. Martin* (Civ. App. 1925) 267 S.W. 1047. In the case of *Conrads v. Kasch* (Civ. App. 1930) 26 S.W. 2d 732, 737 and 738, the rule set out above was questioned, but, even there, it held that where limitations have not elapsed, it is incumbent upon the other side both to plead and prove extraordinary circumstances which would work a grave injustice upon him to render such a defense available. See also 35 *Tex. Jur.* 2, Sec 6, pages 466-468.

Finally, in 30 *C J S*, Section 129, at page 88 it is said:

"The doctrine of laches is not strictly applied between near relatives and the fact that the parties are connected by ties of blood or marriage tends to excuse an otherwise unreasonable delay".

3. On the question of Interrogatory No. 7 and the Jury's verdict.

As has already been pointed out, the jury's answer to Interrogatory No. 7 was favorable to John Altman. By such answer, it was found that, after April 30, 1961, and before January 1, 1966, John Altman had not intentionally given up his claims to the assets other than the wine business (R 1347). This answer apparently conflicts with the answers to Interrogatories Nos. 2 and 5, but seemingly it did not conflict as the Jury saw it because they were attempting to accomplish a compromise whereby Altman would get the wine business (which the Trial Court had already told them he claimed) and would get back the money in his capital account and the Stocktons would keep such stocks as were left (R 1357 & 1358 — Affidavit). When this was discovered, John Altman asked that the Trial Court request the jury foreman to come into Court (R 1389 & 1390) and explain the ambiguity but the Trial Court refused to do this (R 1400). There is authority for granting the request Altman made provided the inquiry is directed to ascertaining the jury's true verdict and is not intended as a means of impeaching an otherwise valid verdict. See *Freid v. McGrath* (DC, 1943) 135 F.2d 833, 834. As new trials should be granted where necessary to prevent a failure of justice where accident, mistake or misfortune in the conduct of the

trial is involved, we submit the Trial Court abused its discretion in not grantng such request. See *Encyclopedia of Fed. Prac.* Section 34.09, page 79.

Also, in the alternative, the Trial Court erred in not giving any meaning to the jury's answer to Interrogatory No. 7. It is the duty of the Trial Court to resolve conflicts if the same can be accomplished. See *R. B. Company Inc. v. Aetna Insurance Co.* (5th Cir. 1962) 229 F. 2d 753, 759. One method by which such conflict could have been resolved was by giving Altman an accounting with respect to his capital account and cash on hand, and exclude from consideration the stocks themselves. In such a case, it would have been necessary in all likelihood to sell some of the stocks to raise the money with which to repay the capital account.

4. On the alternative findings by the Trial Court.

When this case was submitted to the jury on special interrogatories, the jury was advised that they should not attempt to answer the last six interrogatories if they answered Interrogatory No. 1 in the negative (R 1340). The reason for this is clear enough. If there had been no partnership in the first place then the jury does not need to consider, and should not logically consider, what had occurred thereafter that might have caused Altman to lose a right to accounting which he did not have to begin with. Rule 52, F.R.C.P., provides in effect that findings that are clearly erroneous should be set aside on review. In 89 *C J S*, Section 636, it is said at page 466:

> "A judgment will not be supported by findings of fact which are antagonistic, inconsistent, or contradictory as to material matters, unless the evidence is such that the judgment can be said to be clearly correct regardless of findings".

Concerning the alternative finding of the Trial Court that no partnership ever existed between the Parties (R 1377), it is submitted that such finding is contrary to the clear weight of the evidence. The evidence shows that for eleven years Mr. Stockton filed federal partnership tax returns under oath representing that the agreement of the Parties was precisely as alleged by John Altman. Each year copies of these returns were forwarded to Altman and he continued to perform in accordance with the agreement as represented. Never did the Stocktons tell him that things were not as represented. Whatever the understanding might have been between the Stocktons and their accountant, if they ever had any different understanding, the same was not communicated to Altman. Mr. Stockton testified that he alone dealt with Mr. Rippy. At the trial, neither of the Stocktons were ever able to give any clear and coherent explanation of what their agreement was with Altman. They simply said it was not as represented in the tax returns. They said Altman was on salary, they said they gave him the wine business in the mid fifties or in 1958. They said later they did not give it to him then but gave it to him when they dissolved in April, 1961. All of the evidence proffered by the Stocktons in this connection was so contradictory and indefinite as to challenge credibility.

Rule 52, F.R.C.P., provides in effect that findings that are clearly erroneous should be set aside upon review.

5. On partnership accounting as explained to and understood by the Jury.

See the testimony of CPA Minyard at R 467 et seq. Altman's capital account was a debt of the partnership to him, which the jury said, with the Yes answer to Interrogatory No. 7, Altman never relinquished.

6. On attempt to get Altman to give up his rights to partnership assets.

See the Will tendered to Altman, which he refused to sign (Exhibit P 17). Also, see the partnership settlement agreement tendered to Altman on April 26, 1961, which he refused to sign and returned (Exhibit P 16). Stockton said, "That's when it was time to get rid of him" (R 709).

Immediately thereafter, Stockton prepared the Partnership Final Return for period January 1, 1961 through April 30, 1961, which acknowledged John Altman as 50% partner (at page 5 of that return) through April 30, 1961.

NOTE: This additionally substantiates that on April 30, 1961 Stockton, who prepared and signed the return for the partnership still recognized John as a 50% partner. This fact alone estops the Fifth Circuit from using the two IFs on pages 12 and 13 of the opinion against John. By virtue of this admission by Stockton, the Fifth Circuit cannot assume that the jury believed any ex-

press or implied agreement had been consummated between Stockton and Altman by April 30, 1961. If otherwise, the FINAL RETURN would have been dated as of an earlier date by Stockton. See Exhibit P 14.

7. On Trial Judge's comments on weight of evidence.

See the remarks of Judge Seals (R 1205 et seq, pages 1225 and 1226). Consider the prejudicial wording of Interrogatory No. 2 which must have influenced the jury. Altman was not claiming 100% of the wine business. See R 1320, 1327.

See *Hodges on Special Issue Submission in Texas*, copyright 1959, University of Texas Law School Foundation, pages 19, 21, 22. See Hodges 1969 Supplement, Page 17 et seq.

See *Kirk v. Marshall*, 247 SW 2d 454 (Tex. Civ. App. 1952), at page 456.

> "Even though an issue in a series comes after a necessary prior finding and the jury is also instructed not to answer the next issue if the prior issue is answered in the negative, it does not and cannot cure the error of omission of the term 'if any' in the dependent issue."

8. On the nature of an action for accounting between partners.

After the verdict had been received by the Trial Court and before Judgment had been entered, Appel-

lant filed his Request for Finding of Fact and Conclusion of Law (R 1348). This request was filed under Rule 52, F.R.C.P., under the theory the jury's verdict was advisory only and the Trial Court was required to make findings of fact and file conclusions of law. In denying such request, the Trial Court set out in its Judgment that the jury's verdict was binding upon the Court (R 1376). However, alternative findings were made by the Court. After the entry of Judgment, Appellant filed his Motion to Amend Findings and Judgment and Alternatively To Grant A New Trial (R 1378). This was filed within ten days after the Judgment was entered.

The case at bar is a suit for accounting between partners and, as such, is a suit in equity. *Miller v. Howell* (Civ. App. 1950), 234 S.W. 2d 925; 44 Tex. Jur. 2d, Sec. 229, pages 554. In federal court, the right to a jury trial depends upon whether the cause of action in its essence is one of law or in equity. See 35B *C J S*, Sec. 945, page 294; *Barron and Holtzoff*, Vol. 2B, Sec. 872, page 21 and *Humble Oil & Ref. Co. v. Sun Oil Co.* (5th Cir., 1951) 191 F. 2d 705. In the Humble Oil Case, supra, it is said at page 718:

> "A suit to quiet title is a purely equitable proceeding, and a federal court is not required to resort to a jury, nor could it do so except for advice, although the cause was carried to the federal court from a state court in a state (Texas) granting the right to jury trials in such cases. . . ." (parenthetical comment added).

There is an exception to the rule set out above. Rule 39(c), F.R.C.P., contemplates that, in actions not triable of right by a jury, the court upon motion or of its own initiative may try any issue with an advisory jury. Also, such rule provides that the court, with the consent of both parties, may order a trial with a jury whose verdict has the same effect as if trial by jury had been a matter of right.

The Trial Court concluded that Appellant consented, within the meaning of Rule 39 (c), to trial by jury. The recitations of the court leave the impression that Appellant did not expressly agree or consent to a binding trial by jury but rather that he impliedly consented by not objecting to the action of the court in placing the case on the jury docket. If this impression is a correct interpretation of the court's holding, it is submitted that such holding is in error. Rule 39 (c) gives the trial court complete discretion to decide, in all actions not triable of right by a jury, whether or not an advisory jury would be used. *Delman v. Federal Products Corp.* (1st Cir. 1958) 251 F2d 123; *In Re Pan-American Life Insurance Co.* (5th Cir. 1951) 188 F2d 833. As it was completely within the trial court's discretion to grant the request of the Stocktons for a trial before a jury, it would have been improper for Appellant to object. Appellant's failure to object, therefore, can not be construed as a giving of consent to be bound by such verdict, especially when it is illogically and improperly construed, it would seem that the better interpretation of Rule 39(c) would be to consider the jury trial afforded as being advisory only unless both parties have expressly consented to be bound thereby.

However, if the jury's verdict is binding on the Trial Court, we urge that the Jury's verdict be logically construed so as to leave Altman with his capital account and his partner's equity in assets on hand at April 30, 1961.